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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

ANITA D. BORLAWSKY
Petitioner

VS.

TOWN OF WINDHAM; MICHAEL R. DENBOW; SCOTT LOSCIUTO AND JANETTE LOSCIUTO
Respondents

CUMBERLAND, COUNTY OF AND JOACHIEM SCHNUPP
- Defendants

On Petition for Writ of Certiorari
To The First Circuit Court of Appeals

PETITON FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether under the Fourth Amendment, the "totality of the circumstances" principle established in Illinois v. Gates, 462 U.S. 213 at 230-232 governing a police officer's investigatory obligations in reaching a probable cause determination to arrest without a warrant a person suspected of having committed an offense not in the officer's presence, requires that the officer reasonably investigate and take into account all the fundamental facts and circumstances readily available to him before making the determination that valid probable cause exists.
2. Whether under the Fourth Amendment the cumulative effect of the misconduct of a police officer in making and maintaining the arrest of a person without probable cause can constitute excessive force notwithstanding that each instance of misconduct standing alone may not rise to that level. Graham v. Connor, 490 U.S. 386, 394-396.
3. Whether under the Fourth Amendment and 42 U.S.C. § 1983, a private party can acquire state-actor status by virtue of having in bad-faith actively participated in a warrantless arrest without probable cause by a state law enforcement officer. Dennis v. Sparks, 449 U.S. 24 at 27-28.
4. Whether under the Fourth Amendment and 42 U.S.C. § 1985(3), persons who are divorced or otherwise single women parents are a protected class against conspiracies arising out of prior and existing relationships between former husbands and in-laws. Bray v. Women's Health Clinic, 506 U.S. 263.
5. Whether Federal Rules of Civil Procedure, Rule 52(b) applies to Rule 56.

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BASIS FOR SUPREME COURT JURISDICTION

The Judgment of the First Circuit Court of Appeals was entered in this action on July 6, 2001, per curiam.

The ORDER denying Petitioner's request for rehearing en banc and before the original panel was denied and entered on September 20, 2001.

The jurisdiction of the Supreme Court to review the Judgment of the First Circuit Court of Appeals derives from 28 U.S.C. §§ 1254 and 1257.

CONSTITUTIONAL PROVISIONS

4th Amendment, U.S. Constitution (Appendix, page 50)
14th Amendment, U.S. Constitution (Appendix, page 51)
42 U.S.C. § 1983 (Appendix, page 36)
42 U.S.C. § 1985(3) (Appendix, page 37)

MAINE STATE STATUTES

34-B M.R.S.A. §§ 3862 and 3863 (Appendix, pages 40-42)
17-A M.R.S.A. § 106(1) (Appendix, page 38)
17-A M.R.S.A. § 207 (Appendix, page 38)
19-A M.R.S.A. §4002(1)(A) (Appendix, page 38)
19-A M.R.S.A. §15(1)(A)(5), (5-A) (Appendix, pages 39-40)

STATEMENT OF THE CASE

PROCEDURAL BACKGROUND

The action was commenced in Maine State Superior Court, alleging violations of Petitioner's federal rights under the Fourth, Fifth, Eighth and Fourteenth Amendments to the U.S. Constitution and as prescribed by 42 U.S.C. §§ 1983 and 1985(3), together with several State common law torts and statutory civil rights violations.

The Defendants, Joachiem Schnupp and Cumberland County removed the action to U.S. District Court under the authority of 28 U.S.C. § 1441. The Complaint raising federal questions, jurisdiction of the District Court was appropriate under 28 U.S.C. § 1331.

The central allegation relating purely to the federal questions is that the Defendant Denbow arrested the Petitioner on July 30, 1997 without a warrant and without probable cause; and that Respondents Losciuto unlawfully conspired, procured and participated in the unlawful arrest and subsequent prosecution of the Petitioner.

The District Court granted summary judgment to all defendants; but Petitioner is pursing this appeal only against the Defendants Denbow, Town of Windham, Janette Losciuto and Scott Losciuto. The Order granting summary judgment was filed on September 26, 2000; but no separate document purporting to be the final judgment was entered. Treating the Order as an "order" within the meaning of Local Rule 6, Plaintiff filed the MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW on October 16, 2000. The District Court considered the motion on its merits and denied on October 19, 2000, stating that "...Rule 52 does not

apply to summary judgment..." Twenty-nine days later, on November 17, 2000, Petitioner seasonably filed her NOTICE OF APPEAL to the First Circuit Court of Appeals (28 U.S.C.A. § 1291).

FACTUAL BACKGROUND

For simplicity, the following designation will identify the Parties referenced in this Petition: Petitioner (ANITA); Respondent Scott Losciuto (SCOTT); Respondent Janette Losciuto (JANETTE); Respondent Michael Denbow (DENBOW); Respondent Town of Windham (WINDHAM); Defendant JOACHIEM SCHNUPP (SCHNUPP); Janelle Losciuto (JANELLE); and Joseph Losciuto (JOSEPH).

ANITA and SCOTT were formerly husband and wife, having been divorced in 1987. Janelle and Joseph were born of the marriage on November 11, 1983 and March 23, 1986, respectively. JANETTE is the mother of Scott and former mother-in-law of ANITA and grandmother of JANELLE and JOSEPH. Under the divorce decree, ANITA and SCOTT were given joint custody of the children but their primary residence was to be with ANITA.

In July of 1997, ANITA and JANELLE went with a group of other persons to a clogging competition in Chesapeake, Virginia. On their trip down to Virginia, and during the competition ANITA objected to the older girl's use of vulgar language relating to sex, orgasms and the use of condoms. The older girls were sixteen and seventeen years of age and Janelle was only thirteen. ANITA cautioned JANELLE about not keeping a close relationship with the older girls. JANELLE resented her mother's interference and a strain developed between them, a strain that was later aggravated on the return trip to Maine when

JANELLE, contrary to ANITA's wishes, left ANITA stranded at a service area on the New Jersey Turnpike after the van in which they were riding had broken down.

JANELLE returned to Maine on July 28 and went to JANETTE's residence in Windham, Maine. Because of ANITA's work schedule and JANELLE's desire to attend school in Windham, JANELLE was occasionally permitted "...part of the time..." to stay over at her grandmother's home - not 90% of the time as DENBOW claimed (DENBOW Deposition C, page 21, lines 1-4 and page 29, lines 1-23) and (PAT Transcript, Testimony of JANETTE at page 4, lines 19 through page 5, line 5); however, school was out for the summer and both JANELLE and JOSEPH should have been at their own home in Naples, Maine with their step-father, Michael Borlawsky. ANITA finally got back to Maine on July 30. At about 8:00 a.m. on that date she went to JANETTE's residence to distribute gifts bought in Virginia and to pick up JANELLE and JOSEPH. After a half-hour or so of pleasantries, ANITA instructed JANELLE and JOSEPH to get dressed and get in their vehicle to go home. JANELLE refused and the situation then escalated into a rebellious confrontation between ANITA and JANELLE. The exchange got around to the conduct of JANELLE and the older girls during the clogging event. ANITA told JANELLE that if she continued to associate with the older girls and other activities with their boyfriends that she would get a reputation of being a slut as one of the other mothers had suggested. At that point, JANELLE became very angry and called her mother a "fucking slut." Whereupon, with a reflex-like response, ANITA slapped JANELLE once across the side of the face. JANELLE in disbelief because her mother had never struck her before for any reason, threw herself onto the bed and went into a tantrum, screaming and hollering and kicking while in a sitting position. ANITA

struck JANELLE only once, never choking her, nor got on top of her (ANITA Deposition B, page 33, line 16 through page 41, line 18; and page 166, line 2 through page 176, line 12) and (JOSEPH Affidavit, Appendix, pages 45-47). JANETTE claimed that without provocation, ANITA struck JANELLE in the face and head with her hands and fists several times.

At ANITA's insistence, JANELLE and JOSEPH got into the vehicle and accompanied ANITA to their other grandmother's home in Gray. After running a few errands for ANITA's mother, all three started for their home in Naples; enroute they stopped at the Dry Mills Store to purchase Italian sandwiches for lunch when they got home. The kids went in the store and ANITA remained in the vehicle.

In the interim, JANETTE called SCOTT who instructed JANETTE to call the Windham Police Department. SCOTT, in turn, called the Cumberland County Sheriff's Department. DENBOW responded to the call from JANETTE. According to DENBOW, JANETTE told him the following: while in Virginia the relationship between ANITA and JANELLE became strained and that on their return trip to Maine the van in which they were riding broke down and JANELLE ran away from ANITA and returned to Maine with other members of the group when ANITA suggested hitch-hiking back; that ANITA came to her home to pick up the children when she returned to Maine on July 30th around 8:00 a.m. and that when she arrived, everything was calm and pleasant; that when ANITA went into the bedroom a discussion developed between ANITA and JANELLE concerning JANELLE's conduct on the trip; that JANETTE then heard yelling and screaming; that JANETTE went into the bedroom and saw

ANITA on top of JANELLE in the bed hitting her in the head with her fists and hands and choking her; that JOSEPH, the younger child (age 11) was also in the bedroom; that JANETTE told him to call the police, but ANITA told JOSEPH and JANELLE to go and get in the car or else they would get something worse when they got home; that as ANITA and the children were leaving the house, ANITA told JANETTE that if JANETTE called the police or SCOTT, she would leave the state with the two kids. DENBOW also stated that JANETTE told him that the kids stayed with her 90% of the time; that two years earlier, ANITA had threatened to leave the state and send the kids back in pieces; and that ANITA had been committed to a mental hospital about ten years prior for suicidal tendencies. DENBOW's deposition testimony relating to the foregoing appears at DENBOW DEPOSITION C, pages 15-18. Denbow also called the Department of Human Services from JANETTE'S residence and reported the incident, but the intake representative did not feel the incident was serious enough to require departmental intervention (DENBOW DEPOSITION C, page 25, lines 1-24).

JANETTE at the protection from abuse hearing and in her subsequent deposition testimony either denied giving DENBOW all the information he attributed to her or that the events he says she described to him ever occurred at all. The critical contradictions are as follows:

a. Janette did not see Anita choking Janelle (CAT Transcript F, pages 106-110, Petition Addendum, page 28).
b. Janette did not see Anita on top of Janelle, but rather Anita was standing beside the bed when the alleged assault occurred (Janette Deposition E, page 27, lines 11-23, Petition Addendum, page 29).

c. Janette has no knowledge of Anita ever having said that she (Anita) would leave the state and send the kids back in little pieces (Janette Deposition E, page 74, lines 10-14, Rehearing Addendum, page 30).
d. Janette has no knowledge of Anita having assaulted Janelle or Joseph on prior occasions (PAT Transcript A, page 11, line 23 through page 12, line 18, Rehearing Addendum, pages 31-32).
e. Janette has no recollection that as Anita left with the children she (Anita) threatened to leave the state with the children if Janette called Scott or the police (Janette Deposition E, page 71, lines 18-23, Rehearing Addendum, page 33).
f. Janette called the police not to report an assault, but to inquire about her own rights and to get a restraining order against Anita to prevent Anita from returning. She did not call out of concern for the safety of the children (PAT Transcript A, page 19, lines 17-18, Rehearing Addendum, page 34; and Janette Deposition E, page 52, lines 1-13, Rehearing Addendum, page 35).

Also JANELLE in her direct testimony at the criminal assault trial failed to describe any type of striking, hitting or punching on the part of Anita (CAT Transcript F); and that in his affidavit, Joseph stated that he was present in the bedroom and didn't see Anita strike or choke Janelle at all (Affidavit of Joseph Losciuto, Appendix, pages 45-47); and that Anita also denies ever having been confined to a mental hospital (Anita Affidavit, Appendix, pages 47-50).

Back at the Dry Mills Store, after the children returned to the vehicle they started to go to Naples; however, ANITA spotted SCOTT's vehicle parked in the

driveway in front of the Dead River convenience store across the street. She sent the children into the store to look for their father. After the children didn't return in a few minutes, ANITA got out of her vehicle and headed toward the store to collect the children. At this point, SCOTT and two deputy sheriff's came out of the store. One of the officers (SCHNUPP) asked for ANITA's driver's license and whether she had a copy of her divorce decree. ANITA told the officers she didn't routinely carry the divorce decree with her, but that she and SCOTT had joint custody and the children lived with her. SCOTT confirmed that what ANITA had said concerning custody was correct. At that point ANITA began her oddessy into the twilight zone. SCHNUPP handcuffed ANITA in the back in front of the children and put her in the backseat of cruiser. ANITA asked why she was being taken into custody and SCHNUPP sarcastically replied that she shut up and she would find out when she got back to Windham. SCHNUPP did not make any investigation or inquiry into the matter to ANITA or the children despite ANITA's protests of innocence. He relied strictly upon DENBOW's recitation of the alleged events during a cellular phone call and regarded DENBOW's determination of probable cause and request to arrest ANITA as his own probable cause. DENBOW did not ask SCHNUPP to verify the events described by JANETTE before placing ANITA under arrest. All during this period, ANITA was crying and the children were "...crying their little eyes out." At approximately noon, Deputy SCHNUPP transported ANITA to the Windham Police Department and instructed SCOTT to take the children. (ANITA Deposition B, page 37, line 3 through page 45, line 22, and page 178, line 13 through page 181, line 18; SCHNUPP Deposition D, page 14, line 18 through page 28, line 3).

Upon arrival at the Windham Police Department, SCHNUPP turned ANITA over to DENBOW after removing the handcuffs. DENBOW immediately recuffed ANITA with her hands in back and then initiated the "booking" process. He was assisted by another officer on duty. During the process while sitting on a bench, ANITA collapsed unconscious on the floor. After kicking ANITA with his foot and urging her to stop faking and get off the floor, DENBOW finally called a medic. ANITA told the officers she had hypoglycemia; she was eventually given a Pepsi to drink. The medic reported normal findings other than ANITA's complaints of lightheadedness and weakness (ANITA Deposition B, page 45, line 1 through page 57, line 10; DENBOW Deposition C, page 30, line 5 through page 44, line 19).

Upon completion of his interviews with SCOTT, JANELLE and JOSEPH at approximately 1:30 p.m., DENBOW called Dr. Carl Schuler on the telephone and reported to him all the adverse information relative to ANITA's alleged criminal conduct that he had obtained during the investigation (DENBOW Deposition C, page 44, lines 10-24; page 49, lines 3-8). DENBOW personally observed no deviant or combative behavior on ANITA's part and she denied to DENBOW any thoughts or declarations to anyone that she was considering suicide or "...going to hurt herself." (DENBOW Deposition C, page 64, line 13 through page 67, line 15 and Windham Police Department Arrest Record dated July 30, 1997, paragraph 6, page 3), Appeal Addendum, page 13). Whereupon, DENBOW and Dr. Schuler agreed that DENBOW should take her to P-6 at the Maine Medical Center for psychiatric commitment (DENBOW Deposition C, page 49, lines 3-8). Without complying in any respect with 34-B M.R.S.A. §§ 3862, 3863 or his Departmental Regulations 2-12, DENBOW

transported ANITA to Maine Medical Center and there advised the triage (admitting) staff of the alleged criminal conduct and the prior alleged threats, suicide attempts and other psychiatric problems and behavior on the part of ANITA (DENBOW Deposition C, page 51, line 20 through page 53, line 19).

ANITA was admitted involuntarily to P-6, and DENBOW later that afternoon served protection from abuse papers and issued a summons for domestic violence assault (DENBOW Deposition C, page 53, lines 1-7, Addendum 38). DENBOW urged SCOTT to obtain protection from abuse papers against ANITA after SCOTT expressed concern for the welfare of the children (DENBOW Deposition C, page 57, line 21 through page 59, line 14). ANITA was confined against her will in P-6 for a period of three days, finally being released after examination by a psychiatrist who found her free of any mental problems or need of assistance.

In the initial ex-parte petition from abuse hearing July 30, 1997, the Maine District Court entered a judgment granting temporary custody of the children to SCOTT and imposed strict supervised periods of visitation for ANITA. Thereafter, on October 3, 1997, the Court entered a judgment wherein SCOTT was granted full custody of the children with limited, strict, supervised visitation granted to ANITA. In that proceeding, SCOTT did not call JANELLE and JOSEPH as witnesses. ANITA sought to call them as witnesses on her behalf, but Judge Beaudoin refused to permit their testimony, relying instead solely upon the testimony of SCOTT and JANETTE in relation to the events of July 30, 1997, the day of the alleged assault, and the nature of the relationship between SCOTT, ANITA and the children prior to that date. SCOTT presented himself and called JANETTE as a witness to the events of July 30th, both of

whom perjured themselves in relation to those events upon which the Court entered the Judgment adverse to ANITA (Maine District Court Transcript, PAT, Transcript A, page 4, line 12 through page 24, line 6; and page 110, line 25 through page 135, line 10; and COMPLAINT FOR PROTECTION FROM ABUSE; TEMPORARY ORDER FOR PROTECTION FROM ABUSE AND NOTICE OF HEARING, AND ORDER FOR PROTECTION FROM ABUSE), Exhibits 9, 10 and 5 respectively at Appeal Addendum, pages 26, 27 and 28 respectively.

The Windham Police Department has prepared and published to its officers through its procedural manual GENERAL ORDER: 2-12, effective January 24, 1996, POLICE REPONSE TO DEVIANT BEHAVIOR; and GENERAL ORDER: 2-8, effective September 1, 1995, DOMESTIC VIOLENCE.

On May 6, 1998, following a full trial on the merits before a Jury in the Cumberland County Superior Court, ANITA was found Not Guilty of the charge of assault upon JANELLE.

REASONS FOR GRANTING WRIT

On the issues relating to probable cause and excessive force under the Fourth Amendment, the decision below conflicts with the decisions of the Supreme Court, several of the other Circuits and the controlling precedent of the First Circuit as well. With respect to the issue of conspiracy on the part of the private respondents under 42 U.S.C. § 1985(3), the question is an important one requiring consideration by the Supreme Court.

With respect to the Circuit Court Judgment, the decision below is so erroneous in both substance and procedure that the supervisory power of the Supreme Court should be invoked to correct the matter.

I. UNDER THE FOURTH AMENDMENT, THE "TOTALITY-OF-THE-CIRCUMSTANCES" PRINCIPLE ESTABLISHED IN ILLINOIS V. GATES GOVERNING A POLICE OFFICER'S INVESTIGATORY OBLIGATIONS PRIOR TO REACHING A PROBABLE CAUSE DETERMINATION TO ARREST WITHOUT A WARRANT A PERSON SUSPECTED OF HAVING COMMITTED AN OFFENSE NOT IN THE OFFICER'S PRESENCE, REQUIRES THAT THE OFFICER REASONABLY INVESTIGATE AND TAKE INTO ACCOUNT ALL THE FUNDAMENTAL FACTS AND CIRCUMSTANCES OF THE PARTICULAR OFFENSE THAT ARE READILY AVAILABLE TO HIM BEFORE MAKING A DETERMINATION THAT VALID PROBABLE CAUSE EXISTS.

The Circuit Court in its decision in this matter simply adopted the reasoning of the District Court. Unfortunately, the District Court Order failed to recite the facts upon which the grant of summary judgment was based. Petitioner filed a motion for findings of fact and conclusions of law under F.R.C.P. 52; but the District Court denied the motion on the grounds that, "Rule 52 does not apply to Summary Judgment. My summary Judgment Order speaks for itself." (Appendix, pages 23-29).

Presumably, the District Court concluded that DENBOW had probable cause to arrest Petitioner and that no genuine issue as to any material fact for jury determination remained. However, Rule 52 does apply to Rule 56 and specific findings of fact and conclusions of law

relating to both probable cause and qualified immunity would have been of great value in this appellate proceeding (Domegan v. Fair, 859 F2d 1059 at 1065, 1066 (1st Cir. 1988); Roque-Rodriguez v. Lema Moya, 926 F2d 103, 105 Note 3 (1st Cir. 1991); and Frances v. Goodman, 91 F3d 5 at 8 (1st Cir. 1996). In any event, Petitioner believes that the decision reached by the District Court and adopted by the Circuit Court clearly conflicts with authoritative decisions of the U.S. Supreme Court, the First Circuit Court of Appeals and several of the other Circuit Courts.

Contrary to the arguments presented by Petitioner (then Plaintiff), the District Court took the position that a police officer is not required to investigate and consider the totality of the facts and circumstances readily available to him in making a determination of probable cause to arrest without a warrant (ORDER ON MOTIONS FOR SUMMARY JUDGMENT, Appendix, page 23 at 26, citing several cases in support of that position, none of which are authoritative here. The cited cases are readily distinguishable on either the underlying facts or legal principles. The result reached, however, conflicts with the established precedent of the U.S. Supreme Court, the First Circuit Court and several other Circuit Courts, clearly mandating that the officer must investigate and consider the "totality of the facts and circumstances" readily available to him. See Illinois v. Gates, 462 U.S. 213, 231, 235 (1983); U.S. v. Maguire, 918 F2d 254, 258 (1st Cir. 1990); U.S. v. Jorge, 865 F2d 6, 9 Note 1; Rivera v. Murphy, 979 F2d 259, 263 (1st Cir. 1992); Rodriguez v. Comas, 888 F2d 899, 902 (1st Cir. 1989) (officer could have gotten arrestee's name simply by asking others present at scene); Lewis v. Kendrick, 944 F2d 949, 952 (1st Cir. 1991) (officer failed to question witnesses at scene, made no inquiry of arrestee as to her version and failed to look for knife at scene); B.C.R. Transport Co., Inc. v. Fontaine, 727

F2d 7 at 11 (1st Cir. 1984) (officer failed to exhaust first-hand sources of information readily available to him, i.e., friend and wife of arrestee); Wagenmann v. Adams, 829 F2d 196 at 203 (1st Cir. 1987) (officer relied on second and third hand hearsay, made no effort to verify the rumors, ignored arrestee's version and failed to make simple telephone calls to clarify the conflicting facts); Sevigny v. Dicksey, 846 F2d 953, 956-958 (4th Cir. 1988) (officer failed to make inquiry of neighbors on the scene, no exigency existed, did not compare facts with essential elements of crimes charged); BeVier v. Hucal, 806 F2d 123 at 126-128 (7th Cir. 1986) (officer must consider totality of circumstances and may not close his eyes to facts that would help clarify circumstances of the arrest and must pursue all reasonable avenues of investigation); Merriman v. Walton, 856 F2d 1333 at 1335 (9th Cir. 1988) (officer must apply a "totality of the circumstances" analysis, making further inquiry beyond initial reports if necessary before making warrantless arrest); Moore v. Marketplace Restaurant, 754 F2d 1336 at 1344-1347 (7th Cir. 1985) (per se effect of "citizen informant rule" does not control, but officer must conduct reasonable inquiry into all the circumstances); Clipper v. Takoma Park, 876 F2d 17 at 19-21 (4th Cir. 1989) (officer failed to investigate leads given by arrestee and failed to interview witnesses and check surveillance film, all of which was readily available to him); Lusby v. T.G.Y. Stores, Inc., 749 F2d 1423 at 1429-1430 (10th Cir. 1984) (officer failed to make investigation of shoplifting charge, ignored protestations of arrestees and relied strictly on a citizen's word); Smith v. Brookshire Brothers, Inc., 519 F2d 93 at 94-96 (5th Cir. 1975) (officer did not conduct independent examination before arrest). See also in principle: Calamia v. City of New York, 879 F2d 1025 at 1032 (2nd Cir., 1989); Morrison v. U.S., 491 F2d at 346 (8th Cir., 1983); U.S. v. Masini, 358 F2d 100 (6th Cir., 1966); and Adams v. Williams, 407 U.S. 143 (1972).

Applying the foregoing principles to the instant case, it is clear that DENBOW should have conducted further investigation before arresting ANITA. Had he inquired of those persons readily available to him, Anita, Janelle [the alleged victim], and Joseph [an eye witness], he would have discovered that practically none of the information he obtained from Janette was trustworthy for purposes of a probable cause determination to arrest Anita for domestic violence assault against Janelle. He would have heard overwhelming denials and a reasonable explanation of the incident coming from Anita; he would have heard from Janelle that nothing other than that Anita's explanation of the event was the true account; he would have heard from Joseph that Anita did not curse, punch or hit Janelle (Joseph Affidavit, Appendix, pages 45-47); he would have discovered that the children were not in danger or threat of continued assaults; and he could have seen that Janelle had no bruises or tell-tale marks of injury, but only red eyes from prolonged crying during the entire episode, including the arrest and handcuffing of her mother. At that point, any reasonably prudent and cautious officer would have realized he was dealing with an ambiguous family situation and not have made a warrantless arrest. State v. Wilder, 748 A.2d 444 at 456.

DENBOW was charged with the presumptive knowledge of the force and effect of the parental privilege prescribed by 17-A M.R.S.A. 106(1) (Appendix, page 38) and the exclusionary effect of 19-A M.R.S.A. 4002(1)(A) (Appendix, page 39) from the domestic abuse statute (Hall v. Ochs, 817 F2d 924 (1st Cir. 1989) (police officer expected to know the law under which he operates and seeks to enforce). Consequently, DENBOW should have realized

that Petitioner had a perfect right to discipline Janelle and that she did not commit an assault.

The Panel in having adopted the reasoning of the District Court has taken a position contrary to and in conflict with the established precedent of the First Circuit Court, the Supreme Court and at least eight of the other Circuits.

II. UNDER THE FOURTH AMENDMENT THE CUMULATIVE EFFECT OF THE MISCONDUCT OF POLICE OFFICER'S IN MAKING AND MAINTAINING THE ARREST OF A PERSON, WITH OR WITHOUT PROBABLE CAUSE, CAN CONSTITUTE EXCESSIVE FORCE NOTWITHSTANDING THAT EACH INSTANCE OF MISCONDUCT STANDING ALONE WOULD NOT NECESSARILY RISE TO THAT LEVEL.

Again, the District Court cited several cases in support of its position that Petitioner failed to make out a case for excessive force in violation of the Fourth Amendment, all of which are distinguishable on the facts. In the instant case, we believe that Petitioner became a prisoner of Denbow without probable cause and her children were immediately taken from her; that she was told to shut up when she asked why she was being arrested; that she was handcuffed behind her back and thrown into a patrol car when she posed no threat of flight or harm to the officer; that she continued to be handcuffed behind her back for four hours until she was finally committed to the psychiatric ward; that she received no assistance and was ridiculed during a vomiting episode at police headquarters; that she was observed by Denbow while she performed the most intimate functions in the bathroom even though she was not combative, uncooperative or otherwise posed a risk of harm to herself or others; that she fell to the floor after passing out

and was kicked, bruised and ridiculed by Denbow; and that she was involuntarily committed to the psychiatric ward without Denbow having complied in any respect with the commitment statute (34-B M.R.S.A. 3862, 3863, Appendix, pages 40-42), which requires certification by a professional examiner before commitment; and also as required by his own department's operating procedures (General Order 2-12).

Applying the above facts to the legal principles set forth in Alexis v. MacDonald's Restaurant, 67 F3d 341 at 352-353 (1st Cir. 1995) and Graham v. Connor, 490 U.S. 386, 394, 396 (1989), the cumulative conduct of SCHNUPP and DENBOW clearly constitutes excessive force within the contemplation of the Fourth Amendment. The Decision of the Panel is contrary to and conflicts with the authoritative precedent of the First Circuit Court and the U.S. Supreme Court. At the very least, a question for the jury remained and summary judgment should not have been granted.

III. UNDER THE FOURTH AMENDMENT AND 42 U.S.C. § 1983 A PRIVATE PARTY DOES ACQUIRE STATE-ACTOR STATUS AND THEREBY BECOME LIABLE BY VIRTUE OF HAVING ACTIVELY PARTICIPATED IN BAD-FAITH IN THE WARRANTLESS ARREST WITHOUT PROBABLE CAUSE BY A STATE LAW ENFORCEMENT OFFICER.

The District Court held that no 1983 violation existed here because SCOTT and JANETTE were private parties and did not have the requisite state-actor status (ORDER ON MOTION FOR SUMMARY JUDGMENT, Appendix, pages 23 at 25). We believe this decision is contrary to the decisions of the U.S. Supreme Court and the First Circuit precedent.

SCOTT and JANETTE acquired state-actor status by virtue of having actively and in bad faith procured and participated in the arrest and prosecution of ANITA without probable cause. The decision of the Panel conflicts with the following precedent: Adickes v. Kress & Co., 398 U.S. 144 at 150-152; Shelley v. Kraemer, 334 U.S. 1 at 14-15; United States v. Price, 383 U.S. 787 at 794-795; Lugar v. Edmunson Oil Co., 457 U.S. at 937 and 941; Dennis v. Sparks, 449 U.S. 24 at 27-28; Gonzalez v. Hernandez-Arencibia, 221 F2d 45 at 49 (1st Cir. 2000); and Casa Marie, Inc. v. Superior Court of Puerto Rico, 988 F2d 252 at 258-259 (1st Cir. 1993). The bad-faith and improper motives of the Respondents would be amply demonstrated at trial on the merits.

IV. UNDER THE FOURTH AMENDMENT AND THE PROVISIONS OF 42 U.S.C. § 1985(3), PERSONS WHO ARE DIVORCED OR OTHERWISE SINGLE WOMEN PARENTS ARE A PROTECTED CLASS AGAINST CONSPIRACIES ARISING OUT OF THE PRIOR AND PRESENT RELATIONSHIPS BETWEEN FORMER HUSBANDS AND IN-LAWS.

The District Court held that Petitioner was not in a protected class and that no conspiracy existed. We believe this is in error; however, we have no precedent squarely in point. We are asking the Court to establish such precedent on this important question. A Supreme Court decision on the issue would affect millions of divorced parents.

We do have a liberty interest of which Petitioner has been deprived, i.e., the family relationship with her children (Stanley v. Illinois, 405 U.S. 645 at 651 (1971)); that she is in a protected class as a woman (Libertad v. Welch, 53 F3d 428 at 449 (1st Cir. 1995)); that her gender-based classification is inherently invidious (Novotny v. Great American Savings

and Loan, 584 F2d 1235 (3rd Cir. 1978)). We believe the class-based animus, and the conspiracy between SCOTT and JANETTE, arose out of a desire to obtain custody of the children, destroy the family relationship on the maternal side and thereby avoid paying child support. There is ample evidence upon which a jury could infer a conspiracy from the conduct of Respondents in their perjurious testimony and their having procured the arrest of Anita without probable cause; the bad-faith initiation of the protection from abuse process resulting in the loss of custody of the children demonstrates that animus quite well.

We believe the foregoing is a sound legal position notwithstanding a dearth of precedent on the precise point and is deserving of Supreme Court consideration.

V. FEDERAL RULES OF CIVIL PROCEDURE, RULE 52(B), (AVAILABILITY OF MOTION FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW) APPLIES TO RULE 56 (SUMMARY JUDGMENT).

Although not assigned by Respondent as a basis for appeal in the Circuit Court, a holding that F.R.C.P. 52(b) does apply to a Rule 56 proceeding would be of great value and guidance to both court and counsel throughout the system.

VI. THE DECISION IS SO ERRONEOUS AND WAS REACHED IN SUCH AN UNUSUAL WAY THAT THE SUPERVISORY JURISDICTION OF THE SUPREME COURT SHOULD BE INVOKED TO CORRECT THE MATTER.

At the lower court level, the District Court Judge ignored all authoritative, substantive and procedural precedents at all court levels in reaching the result in the

ORDER ON MOTIONS FOR SUMMARY JUDGMENT. The following irregularities demonstrate the error of D. Brock Hornby, United States Chief Judge, as contained in the ORDER (Appendix, pages 23-29):

1. There were no definitive findings of fact relating to probable cause set forth in the Order despite the glaring contradictions between DENBOW and JANETTE as to what actually occurred and the powerful language of State v. Wilder, supra at page 456, allowing significant parental rights to punish an errant child, even permitting temporary marks and transient pain to be inflicted.

2. Petitioner's motion for findings of fact and conclusions of law under Rule 52(b) was erroneously and promptly denied as being inapplicable to a summary judgment (Rule 56) proceeding (Domegan v. Fair, 859 F2d 1059 (1st Cir.).

3. He refused to follow existing precedent within the same District to the effect that a police officer's failure to comply with the mentally ill commitment statute (34-B M.R.S.A. §§ 3862, 3863) (Appendix, pages 40-42) is an unlawful seizure within the Fourth Amendment (Judge Carter in Maguire v. Old Orchard Beach, 783 F.Supp. 1475 at 1485 (D.C. Maine, 1992).

4. He refused to follow existing precedent within the same District holding that malice and conspiracy are "fact-driven" issues not "often" or "gracefully" disposed of by summary judgment (Judge Brody in Barber v. Guay, 910 F. Supp. 790 at 802 (D.C. Maine, 1995).

5. He refused to follow overwhelming and controlling precedent in the Supreme Court and the First Circuit Court of Appeals relating to the issues of probable cause, excessive force and conspiracy, all as hereinbefore setforth in this Petition.

6. The cases cited by the District Court in support of its position clearly were not authoritative in that the cases were readily distinguishable in principle from that advanced by the Plaintiff, as well as the extreme factual differences within the cited cases.

7. He failed to address the issue of possible municipal liability on the part of WINDHAM for callous indifference apart from the question of DENBOW's liability. It is not clear from the Order whether DENBOW's lack of liability or his immunity is based upon a finding of valid probable cause or qualified immunity. Assuming the latter, that possible eventuality should have been addressed by the District Court.

The First Circuit simply adopted the Judgment of the District Court and its reasoning, thereby approving its content. On application for rehearing, four of the five justices to whom the application was submitted *en banc* voted not to rehear, the fifth justice having recused himself for undisclosed reasons. The original panel unanimously voted (3 to 0) not to rehear. A call by counsel to the Clerk's office revealed that three of the four justices who voted not to rehear *en banc* were the same three justices who comprised the original panel. The names of the particular justices appear on the original JUDGMENT (Appendix, page 34) and the ORDER OF THE COURT denying rehearing

(Appendix, pages 35-36). Justice Kermit Lipez was the fifth member of the roster of judges in regular active service who recused himself.

The purpose of an application for rehearing *en banc* under F.R.A.P. Rules 35 and 40 is to insure that a litigant's appeal is ultimately considered by the full Circuit Court; and equally important, that the Circuit Court is thereby able to maintain uniformity among its panels, all of which are to be governed by the precedent set by the particular Circuit, other Circuits and the Supreme Court. It would seem that neither of those noble purposes were served or fulfilled in this instance.

Because the case is so overwhelmingly erroneous in light of all precedents at all levels and because of the unusual substantive and procedural methods in which it was handled, the Supreme Court should grant certiorari and correct the matter.

CONCLUSION

There are numerous other points of law and factual matters not included in this Petition due to the page limitations. However, all matters will be presented by Petitioner at a jury trial on the merits.

Respectfully submitted,

DATED: December 14, 2001

Grover G. Alexander
Attorney for Petitioner
Supreme Court
Bar No. 50799

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLAWSKY,
PLAINTIFF

Civil No. 99-272-P-H

V.

TOWN OF WINDHAM, ET AL.,
DEFENDANTS

ORDER ON MOTION FOR SUMMARY JUDGMENT

This dispute arises out of a confrontation between a mother and her teenage daughter. Foul names were exchanged, the mother struck the daughter and made a threat of some sort (the manner and the nature of both the physical contact and the threat are disputed). The episode, or parts of it, occurred in the presence of another child and the grandmother, the divorced husband's mother. As a result, the grandmother called the father/divorced husband and, on his advice, proceeded to call law enforcement authorities. The father/divorced husband also called law enforcement authorities. Ultimately the mother was arrested and charged with domestic violence assault. She was acquitted. The father/divorced husband sought a protection from abuse hearing on behalf of the children and, as a result, the plaintiff lost custody of the two children to her divorced husband. Subsequently and in an obvious effort to vindicate herself, she brought this lawsuit for damages in state court against the divorced husband, the grandmother, law enforcement officers and their employers. The defendants removed it to federal court. The remaining defendants have moved for summary judgment.

It should be apparent from this brief description that no one will ever know finally who was right or wrong or, more likely, to what degree they were right or wrong in this unfortunate family dispute. There have already been two trials in state court growing out of the episode. Neither the plaintiff nor the defendants are ever going to have complete satisfaction; that is not the nature of these kinds of disputes, and because children are involved, the wounds here will not heal quickly, if ever. The plaintiff has a long list of claims against the defendants; most of them are state claims, and at least one of them involves interpretation of a "unique" state statute that I have already referred to as worthy of certification to the Maine Law Court. As a federal judge, I address only the narrower federal claims and conclude that the defendants are entitled to summary judgment on all of them. Judgment shall, be entered accordingly and the remaining state claims will be remanded to state court. 28 U.S.C.A. § 1367(c) (West 1993). This outcome is particularly appropriate here where one of the state law claims (civil perjury) raises unique and difficult issues of state law. See Order, Dec. 22, 1999, at 4 (order denying motion to dismiss).

DIVORCED HUSBAND/FATHER AND GRANDMOTHER

The only explicit federal claim against Scott Losciuto, the children's father, and against Janet Losciuto, the children's grandmother, is a claim under 42 USC.A. § 1985(3), the civil rights conspiracy statute. Coverage of that statute, however, is limited to conspiracies based upon racial or some other class-based invidious discrimination. See Romero-Barcelo v. Hernandez-Agosto, 75 F.3d 23, 34 (1st Cir. 1996). There is no evidence of any such conspiracy here. The class for which the plaintiff claims protection is "divorced or otherwise single women parents." Pl.'s Mem. in Opp'n to Def. Scott Losciuto's Reply Mem. at 6. That is not a

recognized class[1]. To the extent that the plaintiff is stating a separate claim against Scott or Janet Loscuito under 42 U.S.C.A. § 1983 (the Complaint is unclear), it fails for lack of state action on the part of Scott or Janet Losciuto, who are private parties. See Gonzalez-Morales v. Hernandez-Arencibia, 221 F.3d 45, 49 (1st Cir. 2000).

TOWN OF WINDHAM AND POLICE OFFICER DENBOW

There are two federal claims against the Windham defendants. The primary one is that there was no probable cause for the arrest initiated by Officer Denbow. But the plaintiff does not contend that the witness statements Officer Denbow had received, if believable, failed to provide probable cause; the plaintiff's argument is that officer

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[1] Moreover, the only motivation disclosed by the summary judgment record is personal dislike. The plaintiff admitted the following factual assertion by Scott Loscuito:

> [The Plaintiff identified her allegations concerning Scott Loscuito's motivation for his actions: "Since our divorce in 1997, Scott has always wanted to 'get even' with me for having him arrested for assaulting me. He always[sic] felt that I give him a hard time about child support. He was always behind in his payments. He has always been motivated by revenge and a wish to avoid paying child support. I took him to Court on this issue as well. Scott does not like me and I believe he is still fighting the battles which occurred during our marriage." See [Pl.'s Ans. to Interrogs. Propounded by Def. Scott Loscuito at 126]; see also Pla.'s Opposing SMF at ¶ 51.

Reply Statement of Material Facts ¶ 4. For the admission, see Pt.'s Statement of Material Facts in Opp'n to Def. Scott Losciuto's Reply Statement of Material Facts ¶ 4. The plaintiff goes on to say that Scott Losciuto's motivation is "further explained in the Anita Borlawsky Affidavit" at paragraphs six and seven. See id. Neither paragraph suggests a class-based motivation for Scott Losciuto and Janette Losciuto's actions.

Denbow should not have believed them and should have done more investigation to test the credibility of these witness statements. I find no support for that proposition. See, e.g., United States v. Bonilla Romero, 836 F.2d 39, 46 (1st Cir. 1988) (noting that probable cause does not require police officers to investigate every possibility of innocence and doing so burdens public safety); Kelley v. Myler, 149 F.3d 641, 646-47 (7th Cir. 1998) (holding that once probable cause is established, officer is not required to investigate further); Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123, 128 (2d Cir. 1997) (holding that police officer is not required to explore and eliminate all theoretically plausible claims of innocence); Brodnicki v. City of Omaha, 75 F.3d 1261, 1264 (8th.Cir. 1996) (noting that officers are not required to conduct mini-trials before arrest). On probable cause determinations, courts do not second-guess the credibility determinations of law enforcement officers on the scene. See Baker v. McCollan, 443 U.S. 137, 145 (1979); White v. Town of Marblehead, 999 F. Supp. 345, 350 (D. Mass. 1997). This especially holds true for officers investigating complaints of domestic violence. See White, 989 F. Supp. at 350 (noting that after determining probable cause, the law has recognized the need for "urgent and decisive action," particularly in situations of domestic violence).

The second federal claim, excessive force and substantive due process, is barely pressed. The Plaintiff's entire argument on that topic is the following:

> Assuming, arguendo, that the arrest was based upon probable cause, ANITA still maintains that the force used to effect and maintain the arrest was excessive, and that DENBOWS conduct in kicking her, watching her go to the bathroom, keeping her in cuffs behind her back, and his failure

> to comply with the statutory procedure for the handling of and transporting of persons to a mental hospital, 34-B M.R.S.A. 3862, 3663, as well as the applicable General Order 2-12 setting forth his department's operating procedure for handling deviant behavior is a substantive due process violation. DENBOW claims to have ultimately regarded ANITA as a person exhibiting deviant behavior and acted accordingly.

Pl.'s Resp. to Defs. Windham and Denbow Mot. for Summ. J. at 8. The plaintiff's summary treatment of this argument justifies equally summary treatment by the court. The plaintiff's evidentiary support for these allegations reveals that the monitoring of her bathroom activities occurred in the psychiatric ward of the hospital where she had been involuntarily admitted after a medical advisor advised Officer Denbow to take her there for examination. Borlawsky Dep. at 57-59, 185. The alleged "kicking" occurred earlier at the police station, when she says that she passed out from low blood sugar and fell from a bench to the floor:

> And I was on the floor and my hands were still handcuffed behind my back and Officer Denbow said - he started kicking me on my outer left thigh from my knee to my hip. He was kicking me and telling me to get up off that floor, stop your faking, you know, stop the dramatics, you know.
> Q. When you say he was kicking you, what do you mean, how was he kicking you?
> A. You want me to demonstrate?
> Q. Well, I mean was he like winding up and kicking you or was he just nudging you with his foot?
> A. No, he was kicking me, you know, kicking me.
> Q. And was this while you were unconscious?

A. Yes.
Q. How did you know he was kicking you if you were unconscious?
A. Well, because I was coming in and out and I could feel it. I could feel every time he kicked me.

Borlawsky Dep. at 51-2.

I assume that observing intimate activity of an arrestee without justification can sometimes be a Fourth Amendment violation, but the plaintiff's evidence simply does not make that case here under the circumstances of involuntary admission to a psychiatric ward on a doctor's advice with concern for the plaintiff's risk to herself or others. See Cookout v. Powell, 945 F.2d 441, 447 (1st Cir. 1990) (noting that inadvertent, occasional, casual and restricted observation of inmate's body by an officer of opposite sex does not violate the Fourth Amendment and emergency circumstances, like harm to oneself, allows more direct observation); Ellis v. Meade, 887 F. Supp. 324, 332 (D. Me. 1995) (holding that officer's view of plaintiff's shower, in light of his suicide watch, did not violate the Fourth Amendment). Likewise, kicking an arrestee can amount to unconstitutional use of excessive force, but the encounter the plaintiff describes in her deposition, while perhaps unprofessional as she describes it, does not meet the constitutional standard to make out a substantive due process violation. See Ellis, 887 F. Supp. at 329 (holding that officer's patting pretrial detainee on the buttocks does not rise to the level of punishment to constitute a constitutional violation). Because the incident was isolated and in an effort to get the plaintiff off the floor of the police station, see Borlawsky Dep. at 51-52, the kicking was not so arbitrary or purposeless so as to lead to an inference of an intent to punish the plaintiff. See Ellis 887 F. Supp. at 1329. The use

of handcuffs for an arrestee is obviously justifiable, see Gold v. City of Miami, 121 F.3d 1442, 1446 (11th Cir. 1997); Foster v. Metropolitan Airports Comm'n, 914 F.2d 1076, 1082 (8th Cir. 1990) and any failure to comply with a state statute or a police department order does not make out a constitutional violation. See Bell v. Wolfish, 441 U.S. 520, 543 (1979) (noting that draft recommendation of Federal Corrections regarding conditions of confinement are not determinative of requirements of the Constitution); Soares v. Connecticut, 8 F.3d. 917, 922 (2d Cir. 1993) (holding that Department of Environmental Protection handcuffing policy has no bearing on whether officers violated constitutional rights).

Accordingly summary judgment shall be entered for the remaining defendants on all the plaintiff's federal claims and the remaining state claims are REMANDED to state court.

SO ORDERED.

Dated this 26th day of September, 2000.

/s/ D. Brock Hornby
United States Chief District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLWASKY, Plaintiff
vs. Civil No. 99-272-P-H
TOWN OF WINDHAM, ET ALS, Defendants

MOTION FOR FINDINGS OF FACT AND
CONCLUSIONS OF LAW

NOW comes the Plaintiff pursuant to Rule 52 and moves the Court to make the findings of fact and conclusions of law upon which the ORDER ON MOTIONS FOR SUMMARY JUDGMENT dated and entered in this action on September 26th, 2000 is founded. In addition to the content of the ORDER the Court is requested to particularly setforth its findings relating to the following:

(1) The specific factual basis upon which Defendant Michael Denbow had made a determination of probable cause at the moment he ordered Deputy Sheriff Jaochim Schnupp to arrest the Plaintiff at the Dry Mills Store in Gray on July 30th, 1997.

(2) Whether or not Deputy Schnupp, Officer Denbow or any other law enforcement officers on their behalf, prior to Plaintiff's arrest, interviewed the alleged victim, Janelle Losciuto, age 13 years, the Plaintiff, the only other witness, Joseph Losciuto, age 9 years, or make any other investigative inquiry into the events alleged to have occurred at the Losciuto residence during which Defendant Janette Losciuto claims the Plaintiff viciously assaulted Janelle Losciuto.

(3) The alleged assault occurred at approximately nine o'clock in the morning on July 30, 1997 at the residence of Defendant Janette Losciuto in Windham, Maine; and the detention and arrest of the Plaintiff occurred at the Dry Mills Store in Gray, Maine at approximately noon on the same date in the presence of Deputy Sheriff Joachim Schnupp, Scott Losciuto, Janelle Losciuto and Joseph Losciuto.

(4) Following the alleged assault, Plaintiff and the alleged victim, Janelle Losciuto, and her brother, Joseph Losciuto, left the residence of Janette Losciuto together at approximately nine o'clock in the morning and traveled to Gray and other locations, ultimately stopping at the Dry Mills Store at noon-time to purchase Italian sandwiches to have for their lunch upon their return to their home in Naples, Maine.

(5) Defendant Janette Losciuto called the Windham Police Department approximately two and a half hours after the alleged assault occurred to find out what her rights were in the matter . . . not to report the alleged assault out of fear for the safety of the children.

(6) Defendants Scott Losciuto and Janette Losciuto are the former husband and former mother-in-law of the Plaintiff.

(7) The Defendants, Denbow and Town of Windham, are presumptively charged with knowledge of the force and effect of Title 17-A M.R.S.A. Section 106 and Title 19-A M.R.S.A. 4002, 1-A, wherein the act of a parent in imposing reasonable discipline upon a child for misconduct is excluded from the crime of assault.

(8) The Opinion in State vs. Wilder, 748 A2nd 444, sets forth the law relating to the right and permissible conduct of a parent under Title 17-A M.R.S.A. Section 106 to administer reasonable discipline to a child as the law has existed in Maine for several years prior to July 30th, 1997.

(9) The knowledge and information comprising the factual basis for Officer Denbow's determination of probable cause to arrest the Plaintiff for domestic violence assault came solely from the Defendants Scott Losciuto and Janette Losciuto.

(10) The arrest of the Plaintiff by Defendant Denbow was procured by the Defendants Scott Losciuto and Janette Losciuto.

(11) Defendant Denbow failed to comply with Title 34-B M.R.S-A. Sections 3862, 3863, relating to involuntary commitment to mental hospitals.

(12) Defendant Denbow failed to comply with the enforcement directives of the Windham Police Department relating to the investigative requirements to determine probable cause (General Order 2-8), and the commitment requirements of Title 34-B-M.R.S.A.3862-3863 (General Order 2-12) relating to insane persons and deviant behavior.

DATED: October 16th, 2000 /s/ Grover G. Alexander
Attorney for Plaintiff

Office of the Clerk
United States District Court
DISTRICT OF MAINE

William S. Brownell
Clerk

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October 19, 2000

TO: Grover G. Alexander, Esq.
John J. Wall, Esq.
Mark G. Lavoie, Esq.
Barri L. Bloom, Esq.

RE: Anita D. Borlawsky v. Town of Windham, et al.
CIVIL NO. 99-272-P-H

Dear Counsel:

Please be advised that the following endorsement was made on the Plaintiff's Motion for Findings of Fact and Conclusions of Law.

"10/19/01 - Denied. Rule 52 does not apply to Summary Judgment. My Summary Judgment Order speaks for itself. /s/ D. Brock Hornby, U.S.D.J."

Very truly yours,
WILLIAM S. BROWNELL, CLERK
By: /s/ Melody Montanese, Case Manager

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 00-2529
ANITA D. BORLAWSKY
Plaintiff-Appellant

VS.

TOWN OF WINDHAM; MICHAEL R. DENBOW;
SCOTT LOSCIUTO AND JANETTE LOSCIUTO
Defendants-Appellees

CUMBERLAND, COUNTY OF; JOACHIEM SCHNUPP
Defendants

Before
Torruella, Circuit Judge,
Selya and Lynch Circuit Judges

JUDGMENT
ENTERED: July 6, 2001

Per curiam. This panel affirms the holding of the district court, based on the reasoning therein. See Borlawsky v. Town of Windham, 115 F. Supp. 2d 27 (D. Mass. 2000) (Order on Motion for Summary of Judgment).

By The Court:
Janice O'Neil, Acting Clerk
By: /s/ Julie Gregg, Appeals Attorney

(cc: Grover G. Alexander, John J. Wall, Aaron K. Baltes and Barri L. Bloom)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ANITA D. BORLAWSKY No. 00-2529
Plaintiff-Appellant

VS.

TOWN OF WINDHAM; MICHAEL R. DENBOW;
SCOTT LOSCIUTO AND JANETTE LOSCIUTO
Defendants-Appellees

CUMBERLAND, COUNTY OF; JOACHIEM SCHNUPP
Defendants

ORDER OF THE COURT

Before
BOUDIN, Chief Judge,
TORRUELLA, SELYA and LYNCH, Senior Judges

September 20, 2001

The panel of judges that rendered the decision in this case having voted to deny the petitions for rehearing and the suggestions for rehearing *en banc* having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals may be heard or reheard by the Court *en banc*,

It is ordered that the petition for rehearing and the suggestion for rehearing *en banc*, be denied.

By The Court:
/s/ Janice O'Neil, Acting Clerk

cc: Grover G. Alexander, Esq.
John J. Wall, Esq.
Aaron K. Baltes, Esq.
Barri L. Bloom, Esq.

---

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R.S. § 1979; Pub. 7. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

§ 1985. Conspiracy to interfere with civil rights

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or in property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived or having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. § 1980).

§ 207. Assault

1. A person is guilt of assault if he intentionally, knowingly, or recklessly causes bodily injury or offensive physical contact to another.

2. Assault is a Class D crime.

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§ 106. Physical force by persons with special responsibilities

1. A parent, foster parent, guardian or other similar person responsible for the long term general care and welfare of a person is justified in using a reasonable degree of force against such person when and to the extent that he reasonably believes it necessary to prevent or punish such person's misconduct. A person to whom such parent, foster parent, guardian or other responsible person has expressly delegated permission to so prevent or punish misconduct is similarly justified in using a reasonable degree of force.

§ 4002. Definitions

As used in this chapter, unless the context otherwise indicates, the following terms have the following meanings.

1. Abuse. "Abuse" means the occurrence of the following acts between family or household members or by a family or household member upon a minor child of a family or household member:

A. Attempting to cause or causing bodily injury or offensive physical contact, including sexual assaults under Title 17-A, Chapter 11, except that contact as described in Title 17-A, section 106, subsection 1 is excluded from this definition;

---

§ 15. Warrantless arrests by a law enforcement officer

1. Except as otherwise specifically provided, a law enforcement officer may arrest without a warrant.

A. Any person who the officer has probable cause to believe has committed or is committing:

(1) Murder;

(2) Any Class C, Class B or Class C crime;

(3) Assault while hunting;

(4) Any offense defined in Chapter 45;

(5) Assault, criminal threatening, terrorizing or stalking, if the officer reasonably believes that the person may cause injury to others unless immediately arrested;

(5-A) Assault or reckless conduct if the officer reasonably believes that the person and the victim are family or household members, as defined in Title 15, section 321;

(6) Theft as defined in section 357, when the value of the services is $2,000 or less if the officer reasonably believes that the person will not be apprehended unless immediately arrested;

(7) Forgery, if the officer reasonably believes that the person will not be apprehended unless immediately arrested;

(8) Negotiating a worthless instrument if the officer reasonably believes that the person will not be apprehended unless immediately arrested;

MENTAL HEALTH 34-B § 3862
Ch. 3

§ 3862. Protective custody

1. Law enforcement officer's power. If a law enforcement officer has reasonable grounds to believe, based upon his personal observation, that a person may be mentally ill and

that due to his condition he presents a threat of imminent and substantial physical harm to himself or to other persons, he:

A. May take the person into protective custody; and

B. If the officer does take the person into protective custody, shall deliver the person forthwith for examination by an available licensed physician or licensed clinical psychologist, as provided in section 3863.

2. Certificate not executed. If a certificate relating to the person's likelihood of serious harm is not executed by the examiner under section 3863, the officer shall:

A. Release the person from protective custody and, with his permission, return him forthwith to his place of residence, if within the territorial jurisdiction of the officer;

B. Release the person from protective custody and, with his permission, return him forthwith to the place where he was taken into protective custody; or

C. If the person is also under arrest for a violation of law, retain him in custody until he is released in accordance with the law.

3. Certificate executed. If the certificate is executed by the examiner under section 3863, the officer shall undertake forthwith to secure the endorsement of a judicial officer under section 3863 and may detain the person for a reasonable period of time, not to exceed 18 hours, pending that endorsement.

4. Transportation costs. The costs of transportation under this section shall be paid in the manner provided under section 3863.

1983, c. 459, § 7, eff. Jan. 15, 1984. Library References Mental health 36. C.J.S. Insane Persons § 64.

§ 3863. Emergency procedure.

A person may be admitted to a mental hospital on an emergency basis according to the following procedures.

1. Application. Any health officer, law enforcement officer or other person may make a written application to admit a person to a mental hospital, subject to the prohibitions and penalties of section 3805, stating:

A. His belief that the person is mentally ill and, because of his illness, poses a likelihood of serious harm; and

B. The grounds for this belief.

2. Certifying examination. The written application shall be accompanied by a dated certificate, signed by a licensed physician or a licensed clinical psychologist, stating:

A. He has examined the person on the date of the certificate, which date may not be more than 3 days before the date of admission to the hospital; and

B. He is of the opinion that the person is mentally ill and, because of his illness, poses a likelihood of serious harm.

UNITED STATE DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLAWSKY, Plaintiff
vs. Civil No. 99-272-P-H
TOWN OF WINDHAM, at als, Defendants

AFFIDAVIT OF MICHAEL BORLAWSKY

I, Michael Borlawsky, having first been duly sworn, do depose and say, that I have personal knowledge of the facts and events hereinafter enumerated.

I live in Naples, Maine with my wife, Anita D. Borlawsky. I am thirty-five years of age, and I am the stepfather to Joseph Losciuto and Janelle Losciuto. Joseph is living with his mother and me in Naples. I believe Janelle presently lives with her father in Windham.

I am aware of the incident at the Losciuto, home on July 30, 1997; but I have no personal knowledge of the events that actually took place there.

I do know that on one occasion when I went to the Janette Losciuto home to either drop-off or pickup the children, which I did from time to time in order to accommodate Anita and Janette, I had a conversation with Janette relating to the arrears in child support that Scott Losciuto owed to Anita and over which Anita had taken Scott back to Court. I believe Janelle had just turned twelve and Anita wanted to collect the arrears and also get an increase in the support if possible. At that time Janette was saying that Anita was being unfair to Scott and that as a result Scott never had any

money for himself. I specifically recall that Janette said that she and Scott were going to do all they could to get full custody of the kids and then Scott would never have to pay Anita all that money for child support again. I told Anita about this conversation.

Because of my status as the kid's step-father, I always tried to get along with the Losciutos; and I was always very patient with Janette when she would complain and criticize Anita to me about how Scott was being treated over the child support issue. Janette always had too much to say unfavorably about people, particularly Anita. She would invite me to have coffee with her and then she would gripe about everything in her life. If it wasn't about Anita, it would be about somebody else she didn't like.

DATED at Gray, Maine this 4th day of August, A.D. 2000.

/s/ Michael Borlawsky

STATE OF MAINE
CUMBERLAND, SS. August 4th, 2000

THEN personally appeared the above named MICHAEL BORLAWSKY and took oath, upon personal knowledge, to the truth of the foregoing events, before me,

/s/ Grover G. Alexander
Attorney at Law

Name Printed: GROVER G. ALEXANDER

UNITED STATE DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLAWSKY, Plaintiff
vs. Civil No. 99-272-P-H
TOWN OF WINDHAM, at als, Defendants

AFFIDAVIT OF JOSEPH LOSCIUTO

I, JOSEPH LOSCIUTO, having first been duly sworn, do depose and say as follows,

My name is Joseph Losciuto and I am 14 years old. I live in Naples, Maine with my mother, Anita D. Borlawsky, and my stepfather, Michael Borlawsky. My real father's name is Scott Losciuto. My sister's name is Janelle Losciuto and she lives with my father in Windham, Maine. I was just 11 years old at the time of the problem between my mother and Janelle at my grandmother's house. Janelle was almost 14 years old.

On that day I know my mother came to pick us up. My mother talked to my grandmother and grandfather in the kitchen. My cousin Sean and me went downstairs to play games. The bedroom where Janelle was is upstairs. In a little while I heard Janelle and my mom screaming at each other in the bedroom. I ran upstairs to see what was going on. My mom was right in Janelle's face telling her to get ready to go. Janelle then started crying and screaming to my grandmother that she didn't want to go. Then my grandmother came running in and stood between Janelle and my mom. My mom pushed Grammy out of the way. Janelle always cries and carries on when she doesn't get her own way. She is very spoiled...even more than me. Grammy told me to call 911 and I left the bedroom. My mom followed

me and told me to get in the car immediately, and I did. My mom never threatened us at all. Me and mom and Janelle left right after and went over to my other Grammy's house in Gray. I thought everything was okay. I didn't see or hear my mom choke or hit Janelle or curse her at any time.
After the cops handcuffed my mom and took her away at the store in Gray, my father took Janelle and me back to Grammy's house in Windham. I was really nervous, and me and Janelle were crying real hard. At the house we talked about what happened. I really became confused because of what Janelle, my father and Grammy were saying about what happened. My father took us to the police station. The policeman told me to write out what had happened, but I told him I was too nervous. My father wrote out the paper and told me to sign the paper, and I did. I was so upset that I agreed with everything my father and the cop said about my mother even though I knew it wasn't true. Afterward, I was influenced by Janelle, my father and grandmother to go and live with my father and grandmother. Janelle wanted to live with them so she could do what she wanted to at school and with the other girls in the Hoedowners. At first, I went along with everything they said . . . even our guardian, Tina Smith.

My father also told me what to say at the trial against my mom. I was really confused and scared there, too. I regret all of that now that I am older and understand things better. My mom has never struck or hit me or Janelle, although there were times we probably deserved it.

DATED at Gray, Maine this 3rd day of August, A.D. 2000.

/s/ Joseph Losciuto

STATE OF MAINE
CUMBERLAND, SS. August 3rd, 2000

THEN personally appeared the above named JOSEPH LOSCIUTO and took oath, upon personal knowledge, to the truth of the foregoing events, before me,

/s/ Meredith E. Davis
Notary Public or Justice of the Peace
[SEAL]
Name Printed: Meredith E. Davis, Notary Public
State of Maine, My Commission Expires on 6/9/2003

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANITA D. BORLAWSKY, Plaintiff
vs. Civil No. 99-272-P-H

TOWN OF WINDHAM, et als, Defendants

AFFIDAVIT OF ANITA D. BORLAWSKY

I, ANITA D. BORLAWSKY, of Naples in the County of Cumberland and the State of Maine, having first been duly sworn, do depose and say as follows:

I am the Plaintiff in the above entitled matter, and I have personal knowledge of the facts and events hereinafter setforth.

I am 35 years of age and I reside in Naples, Maine with my husband, Michael Borlawsky, and my son Joseph. Joseph Is 14 years of age; I have a daughter, Janelle, who lives with her father, Scott Losciuto, In Windham, Maine; Janelle is 16 years of age. My former mother-in-law is Janette Losciuto and she also lives in Windham, Maine about a hundred yards from Scott. I was married to her son, Scott; and he is the biological father of Janelle and Joseph.

I wish to either specifically deny or explain the following:

1) That I ever attempted suicide. On that occasion in 1989 or 1990, and at the suggestion of Dr. Schuler, I voluntarily went to Portsmouth Pavilion in the aftermath of having taken too many of the prescribed painkillers that I had been taking for a number of years because of a severe back condition. I knew that there was no danger of death and I simply on my own took too many of the pills because the pain in my back was excruciating and I couldn't seem to get relief by taking the proper amount. Claiming to want to help me, Janette drove me to Portsmouth and then turned around and told everybody that I had been sent to a mental institution because I tried to commit suicide.
2) That I ever tried to smother or otherwise press a pillow over Janelle's face on July 30th, 1997. At one time during that rebellious encounter, I believe Janelle had her little half-sister, Julia, in her arms or lap; and I know I certainly didn't do anything to Julia either.
3) That the admission history at P-6 came mostly from Sgt. Denbow, and most of that information is incorrect in practically every respect. I do not have a schizophrenic sister and I did not kidnap my kids as the Note recites. I am a nurse and I know how frequently the triage staff

receives incorrect information from all sorts of sources or simply gets things wrong themselves in the rush of emergency room practice,

4) I was committed to P-6 at MMC against my will. I was discharged at my insistence after three-plus days. I was found to be as normal as anyone else on the streets. I received no psychiatric care, nor was any ordered, after my release.

5) I deny that the events involving hitchhiking in trucks, threats and name calling to Janelle as described by Alice Bryant and Kirsten Gustofsen in the course of the protection from abuse hearing ever occurred.

6) Scott and Janette - - mostly Janette - - always complained about Scott having to pay child support and that he was poor and that he had no money for himself and his new family. They said he had to live under such bad conditions as he did because he had to pay so much child support and that I always wanted more. I never asked for more than what the Court ordered and the amount called for by the guidelines. Attached is a photograph of the house foundation he lived in before he got full custody of the children, and also the new house he built afterward when he no longer had to pay me $107.00 per week, and I had to pay him $56.00 per week in addition, after he obtained full custody on October 7th, 19[illegible]

7) Scott always said he would get even with [illegible] for having him arrested for assaulting me during our marriage and "hounding" him for child support. I believe that expressed intention, coupled with his wish to be entirely free of child support payments, explains why he and Janette have lied and done all this to me and influenced Janelle against me. His life style changed greatly to the good after he obtained custody.

DATED at Gray, Maine this 3rd day of August, A.D. 2000.

/s/ Anita D. Borlawsky

STATE OF MAINE
CUMBERLAND, SS. August 3rd, 2000

THEN personally appeared the above named ANITA D. BORLAWSKY and took oath, upon personal knowledge, to the truth of the foregoing events, before me,

/s/ Meredith E. Davis
Notary Public or Justice of the Peace
[SEAL]

Name Printed: Meredith E. Davis, Notary Public
State of Maine, My Commission Expires on 6/9/2003

AMENDMENT IV – SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2)

Supreme Court, U.S.
FILED
FEB 14 2002
OFFICE OF THE CLERK

No. 01-1033

In The

Supreme Court of the United States

ANITA D. BORLAWSKY,

Petitioner,

v.

TOWN OF WINDHAM; MICHAEL R. DENBOW; SCOTT LOSCIUTO; JANETTE LOSCIUTO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION OF RESPONDENT JANETTE LOSCIUTO

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit were correct in concluding that Respondent Janette Losciuto acted as a private person and was therefore entitled to summary judgment on the Petitioner's 42 U.S.C. §1983 claim?

2. Whether the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit were correct in concluding that based on the undisputed material facts the Petitioner did not suffer discrimination as a member of a protected class and that Respondents Janette Losciuto and Scott Losciuto were entitled to summary judgment on the Petitioner's federal civil rights conspiracy claim (42 U.S.C. §1985(3))?

3. Whether Federal Rule of Civil Procedure 52(a) requires findings of fact in resolving a motion for summary judgment?

4. Whether the United States District Court for the District of Maine or the United States Court of Appeals for the First Circuit departed from the accepted and usual course of judicial proceedings?

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JANETTE LOSCIUTO'S BRIEF IN OPPOSITION[1]

Respondent Janette Losciuto respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the Judgment of the United States Court of Appeals for the First Circuit ("the First Circuit") issued on July 6, 2001 affirming the Order of the United States District Court for the District of Maine ("the District Court") dated September 26, 2000, which are reproduced in the Appendix to the Petition at pages 34 and 23, respectively. The Petitioner has failed to generate an issue worthy of review by this Court and the Court should reject the Petitioner's request.

For Janette Losciuto, as for the Windham Respondents, the federal law claims in this case did not turn on any controversial legal points. The District Court, citing controlling authority, noted that a federal civil rights conspiracy claim can proceed only if the alleged conspiracy is based "upon racial or some other class-based invidious discrimination." *Borlawsky v. Town of Windham*, 115 F.Supp. 2d 27, 29 (D.Me. 2000). Not only did the

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[1] To the extent that the Petition for Writ of Certiorari raises issues that are common to Janette Losciuto and Officer Denbow and the Town of Windham, Respondent Janette Losciuto joins in the Windham Respondents' arguments and incorporates them by reference. The first paragraph under the heading "Janette Losciuto's Brief in Opposition" is essentially a verbatim restatement of the Windham Respondents' first paragraph. In the remainder of her brief, wherever Respondent Janette Losciuto incorporates an argument or other statement of the Windham Respondents, the relevant passages are footnoted and identified as the original statements and arguments of the Windham Respondents.

Petitioner fail to establish that she was a member of a class needing protection, the only motivation that the court found expressed on the summary judgment record was personal dislike. *Id.* at 29, n.1. The Court gently acknowledged that the complaint was somewhat lacking in clarity[2], but determined that if the Plaintiff intended to press a civil rights claim under 42 U.S.C. §1983 against her former husband and his mother, that claim could not stand because there was no state action. *Id.* at 29. Again, this ruling did not involve a controversial legal issue at all; one of the threshold requirements of any claim for damages under §1983 is that the defendant acted under color of state law, and this requirement has been in §1983 for well over a century.

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[2] In truth, the complaint was so poorly drafted that even after careful and repeated studying of it neither the parties nor the Magistrate Judge nor the Senior District Judge could ascertain what legal theories were being pled against Scott and Janette Losciuto. There was substantial disagreement on this point in the District Court. The District Court Judge, the Magistrate Judge, and counsel for several of the Defendants expressed frustration with the drafting of the complaint in that legal theories were not clearly articulated and it was at times difficult to determine which claims applied to which Defendants. The complaint uses the word "conspiracy" in Count III, which deals with the Losciutos, but does not cite any particular theory of recovery. Elsewhere in the complaint there is reference to 42 U.S.C. §1983 but it is not clear that that allegation pertains to the Losciutos. In ruling on the summary judgment motions, District Judge Hornby ultimately treated the complaint as including claims against both Janette and Scott Losciuto for deprivation of federal civil rights under §1983 and conspiracy under §1985(3).

The First Circuit, through a panel of three judges, affirmed the District Court's Order based on the reasoning set forth by the District Court Judge. The Circuit Court panel did not deem it necessary to issue a separate opinion, nor did the Court as a whole find any basis for reviewing the panel's decision. While the Petitioner may disagree with these rulings, she has not demonstrated a legitimate reason for the Supreme Court to invoke certiorari review.[3]

STATEMENT OF THE CASE

Anita Borlawsky started this lawsuit in the Superior Court in Cumberland County, Maine in August of 1999 against her former husband, Scott Losciuto; Scott's mother, Janette Losciuto; a Cumberland County deputy sheriff, Joachim Schnupp; Cumberland County; a Windham police officer, Michael Denbow; and the Town of Windham. Ms. Borlawsky, who had lost her temper during an argument on July 30, 1997 with her 13-year old daughter Janelle and hit the girl in the presence of Respondent Janette Losciuto, alleged in her complaint that Scott and Janette Losciuto had maliciously given false information to law enforcement authorities about the incident and had testified falsely in court which led to her losing custody of Janelle and Janelle's younger brother, Joseph.

[3] This paragraph is adopted from the Windham Respondents' Brief in Opposition.

Defendants Schnupp and Cumberland County removed the case to the United States District Court for the District of Maine. On March 31, 2000 the District Court granted the motion of Schnupp and Cumberland County for summary judgment. On September 26, 2000 the District Court entered summary judgment in favor of all remaining Defendants on the federal claims and remanded the state claims to the Superior Court. Anita Borlawsky appealed the September 26, 2000 judgment to the United States Court of Appeals for the First Circuit, which affirmed. Ms. Borlawsky then filed her Petition for Writ of Certiorari. The Respondents are the Defendants whose motions for summary judgment were granted on September 26, 2000: Janette Losciuto, Scott Losciuto, R. Michael Denbow and the Town of Windham.

Pursuant to Supreme Court Rules 15.3, 24.2 and 24.1(g), Respondent Janette Losciuto will briefly recite the facts that are material to the two issues that directly involve this Respondent, *i.e.*, the granting of judgment in favor of Janette Losciuto on the federal civil rights conspiracy claim (42 U.S.C. §1985(3)) and the granting of judgment in favor of Janette Losciuto on the federal civil rights claim (42 U.S.C. §1983).

As the Petitioner points out, the mother and daughter had traveled to Virginia with a clog-dancing group of which Janelle was a member. Petition for Writ of Certiorari at 2. Unfortunately, the trip held some unpleasant surprises for the group, including torrential rains that soaked the costumes during the trip down and a malfunctioning passenger van that caused delays on the trip home. On this point there was direct testimony during

the custody trial from another parent and from one of the other young ladies who went on the ill-fated trip.

Alice Bryant, one of the other chaperones, described the erratic behavior of the Petitioner during the final days of the trip and her hostility towards her daughter, Janelle. Discussing the events of the day when the group left Virginia to begin the trip home, Mrs. Bryant testified that Ms. Borlawsky "lashed out at Janelle. She called her – and excuse me, sir, she called her a 'fucking cunt', followed by 'you fucking bitch'." Transcript of hearing, October 3, 1997, Ninth District Court, Portland, Maine (hereinafter the "Transcript") at 59.[4] Later, at a truck stop in New Jersey, the Petitioner's behavior deteriorated even more:

> [A]ll of a sudden, she came back into the eatery where we were, and she was in a rage. And she told Janelle that she had found a ride to Maine, or Massachusetts, with a trucker, and that Janelle was going to go with her. And at that point, Janelle became very upset and hysterical, and Anita lunged out and grabbed her.

Transcript at 57. *See also* Transcript at 74. Kirsten Gustofsen, a 17-year old clogger who was also on the trip, described the scene as the van carrying Janelle left the truck stop in New Jersey:

> Elise and Janelle came running out very quickly, and Anita was following them, yelling a lot. And we pulled – I pulled Janelle into the car, because she was crying really hard. She was

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[4] Copies of the relevant pages of the Transcript are in the record as Exhibit 2 to Defendant Janette Losciuto's Statement of Undisputed Material Facts.

> hysterical. And Elise followed and closed the door and locked the doors, and Sally [the driver of the van] came. She wasn't – she hadn't gotten into the van yet, so she was around the front. And Anita came and slammed up against the driver's side window, and . . . yelled that she was gonna kill Elise and Janelle if she ever caught them.

Transcript at 94.

According to the Petitioner, between the time the clogging group returned to Maine and the time she showed up at Respondent Janette Losciuto's house on July 30, 1997, the other members of the clogging group told Janette about what had happened during the last few days of the trip. Plaintiff's Separate Statement of Material Facts dated August 1, 2000, ¶11. It was against this backdrop that Respondent Janette Losciuto witnessed the Petitioner lose her temper and hit her daughter.

REASONS FOR DENIAL OF THE WRIT

I. ON THE UNDISPUTED FACTS OF THIS CASE JANETTE LOSCIUTO WAS NOT A "STATE ACTOR" AT ANY RELEVANT TIME.

Section 1983 of the Civil Rights Act of 1871 provides in relevant part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution

> and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This Court has issued scores of opinions interpreting this law since its enactment following the Civil War, and one of the enduring and most obvious requirements for sustaining an action for damages under this statute is the presence of state action:

> To state a claim for relief in an action brought under §1983, [the parties asserting the claim] must establish that they were deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law. Like the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of §1983 excludes from its reach " 'merely private conduct, no matter how discriminatory or wrongful.' "

American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 49-50 (1999) (quoting *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). The District Court and the Court of Appeals for the First Circuit both recognized that the Petitioner's claims against Respondents Janette and Scott Losciuto fall far short of meeting the requirements for a successful claim under §1983.

Janette Losciuto is indisputably a private person who cannot be sued under §1983 unless certain other elements are present. *See, e.g., Snyder v. Talbot*, 836 F.Supp. 19, 23 (D.Me. 1993):

> In order to establish that a private individual acted "under color" of law, the Supreme Court has required a showing that the Defendant

> "reached an understanding" with a state officer, . . . or corruptly conspired with a judge through the use of bribery or other means. . . .

Needless to say, there is no evidence whatsoever of any bribery or corruption in this case. *See also Lefkowitz v. Lider*, 443 F.Supp. 352, 357 (D.Mass. 1978):

> Section 1983 safeguards constitutional rights only from infringement by persons acting under color of state or local authority; an allegation of constitutional violations arising from the acts of private citizens, however willful and malicious, does not state a cognizable §1983 claim.

The *Lefkowitz* court rejected the claim that simply by invoking state laws in the course of litigation a private party can be transformed into a state actor. *Id.* at 358 ("Nor does defendants' resort to the judicial process and to the authority of the Commonwealth's statutes transform these private individuals into state agents. . . . ") These principles apply with equal force to a private person who invokes the criminal laws in an attempt to protect herself or another person. Janette Losciuto's decision to call the police to report the Petitioner's hitting of her daughter did not transform Janette into a state actor with the power to deprive another person of constitutional rights.

With respect to the other essential element of a §1983 claim, *i.e.*, the allegation of deprivation of a federal constitutional right, the Petitioner produced no evidence that Janette Losciuto did anything – either alone or in concert with someone else – that deprived Ms. Borlawsky of any constitutional right.

II. THE FACTS OF THIS CASE COMPLETELY FAIL TO MAKE OUT A CLAIM AGAINST RESPONDENT JANETTE LOSCIUTO FOR CONSPIRACY TO DENY THE PETITIONER THE EQUAL PROTECTION OF THE LAWS (42 U.S.C. §1985(3)).

The civil rights conspiracy statute, 42 U.S.C. §1985(3), "confers a private right of action for injuries occasioned when 'two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws. . . . ' " *Burns v. State Police Ass'n*, 230 F.3d 8, 12 n.3 (1st Cir. 2000) (quoting 42 U.S.C. §1985(3)). The elements of a successful claim under this statute are just as clear as the elements of a §1983 claim as discussed above:

> Our precedents establish that in order to prove a private conspiracy in violation of the first clause of §1985(3), a plaintiff must show, inter alia, (1) that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action," *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), and (2) that the conspiracy "aimed at interfering with rights" that are "protected against private, as well as official, encroachment," *Carpenters v. Scott*, 463 U.S. 825, 833 (1983).

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 267-268 (1993) (parallel citations omitted). As the District Court pointed out, the Petitioner's argument that she is a member of a suspect class, namely divorced or otherwise single mothers, does not satisfy the requirements of §1985(3). The Petitioner has never offered any rationale to

support her bid for recognition of divorced or otherwise single mothers as a suspect classification. Moreover, there is no evidence in this case that any Defendant's conduct toward the Petitioner was motivated by any class-based discriminatory animus. To the contrary, Ms. Borlawsky has always asserted that Janette Losciuto and Scott Losciuto were both motivated by personal dislike of her. *See* District Court's Order on Motions for Summary Judgment at 3, Petition for Writ of Certiorari, Appendix at 25, fn.1. Where the Plaintiff has no support for a claim of discrimination, summary judgment for the Defendant is the appropriate course of action in dealing with a §1985(3) conspiracy claim.

III. FINDINGS OF FACT ARE NOT REQUIRED IN RULINGS ON MOTIONS FOR SUMMARY JUDGMENT.[5]

Federal Rule of Civil Procedure 52(a) specifically states in relevant part that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56." Even if the Petitioner had properly preserved this issue, which she did not, the plain text of Rule 52 contradicts her entire argument.

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[5] This point of argument is adopted *verbatim* from the Windham Respondents' Brief in Opposition.

IV. THERE WERE NO IRREGULARITIES IN THE PROCEDURES BELOW TO JUSTIFY REVIEW BY THIS COURT.[6]

The Petitioner's omnibus argument concerning the treatment of this case below fails to generate an issue worthy of review by this Court. As discussed above, Federal Rule of Civil Procedure 52(a) does not require *any* findings of fact; therefore, the District Court's refusal to find certain facts cannot be erroneous. The remaining examples of misconduct by the District Court relate to that body's alleged failure to follow governing precedent. As discussed above, to the extent the Petitioner preserved the issues by developing cogent arguments, the District Court applied the correct legal standards. The Petitioner's dissatisfaction with the result is no basis for review by this Court.

The Petitioner's complaints about the First Circuit's conduct do not merit a lengthy response. Suffice it to say the First Circuit had the authority to dispose of the case as it did, *see Lawton v. State Mut. Life Assurance Co.*, 101 F.3d 218, 220 (1st Cir. 1996), and the Petitioner did not present the Circuit Court judges sitting *en banc* with a viable reason to review the panel's determination.

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[6] This point of argument is adopted *verbatim* from the Windham Respondents' Brief in Opposition.

CONCLUSION

For all of the foregoing reasons, Respondent Janette Losciuto respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(3)

No. 01-1033

IN THE

Supreme Court of the United States

ANITA D. BORLAWSKY,

Petitioner,

v.

TOWN OF WINDHAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SCOTT LOSCIUTO

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COUNTER-STATEMENT OF THE CASE

Respondent Scott Losciuto has no objection to the Procedural Background set forth in the Petitioner's Statement of the Case. However, Respondent does object to the Factual Background section. Accordingly, Respondent hereby submits a Counter-Statement of the Case. For the sake of convenience, Respondent will use the designations employed by Petitioner in her Petition. *See Petition for Writ of Certiorari* at 2.

FACTUAL BACKGROUND

ANITA and SCOTT were formerly married and are the natural parents of two minor children, JANELLE and JOSEPH. *See Respondent Scott Losciuto's Supporting Statement of Material Facts submitted with Motion for Summary Judgment* ("SMF") ¶ 1. JANETTE is the mother of SCOTT, and the grandmother of JANELLE. *See SMF* ¶ 2. After their divorce, ANITA and SCOTT were given joint custody of JANELLE and JOSEPH, and ANITA was given primary physical residence. *See SMF* ¶ 3. JANELLE and JOSEPH spent a great deal of time with JANETTE. *See SMF* ¶ 4. ANITA and JANETTE were "very close" and had regular contact. *See SMF* ¶ 4.

Several years ago, ANITA and JANELLE took up the sport of "clogging," an Appalachian dance performed competitively. *See SMF* ¶ 5. JANELLE was the Maine State clogging champion and danced with the New England All Star Cloggers. *See SMF* ¶ 5. In July 1997, ANITA and JANELLE attended a clogging convention in Virginia with a group of other teenage girls and adult chaperones. *See SMF* ¶ 6. The group drove down in several vans, including one

driven by ANITA. *See SMF* ¶ 6. It was a hectic trip because there was a hurricane and all the clogging costumes became wet, and because there were problems with the hotel arrangements. *See SMF* ¶ 6.

During the return trip to Maine, ANITA became upset when older girls in her van joked about matters of a sexual nature with JANELLE present. *See SMF* ¶ 7. Subsequently, one of the group's vans broke down in New Jersey. *See SMF* ¶ 7. A "big fight" resulted, and JANELLE ended up driving back to Maine in a separate vehicle from ANITA. *See SMF* ¶ 7.

ANITA returned to Maine on July 30th and picked up JANELLE at JANETTE's house. *See SMF* ¶ 8. ANITA had not slept for two days, except for "little cat naps." *See SMF* ¶ 8. She was angry at JANELLE and had been stressed out for several days. *See SMF* ¶ 8. She talked to JANETTE for about 30 minutes, then impulsively decided to confront JANELLE in JANETTE's bedroom. *See SMF* ¶ 8. Present in the bedroom were ANITA, JANELLE, JANETTE and Julia Losciuto, Scott's baby daughter from his second marriage. *See SMF* ¶ 8. According to JANELLE, ANITA told JANELLE that she could no longer go clogging and called her names such as "fucking cunt" and "ungrateful bitch." *See SMF* ¶ 9. ANITA then laid hands on JANELLE, putting her hands around JANELLE's neck and applying pressure, digging her fingers into JANELLE, and hitting her with an open and closed fist. *See SMF* ¶ 9.

JANETTE corroborates JANELLE's testimony. *See SMF* ¶ 11. She tried to intervene but ANITA shoved her into a corner. *See SMF* ¶ 11. JANETTE did not physically intervene further; rather, she protected her baby granddaughter

Julia because she was concerned about her being injured in the frackas. *See SMF* ¶ 11. She did yell to JOSEPH to call 911, but ANITA ordered him not to do so. *See SMF* ¶ 11. ANITA's story is that she slapped JANELLE only once across the face. *See SMF* ¶ 12.

Although JANELLE initially refused to leave with ANITA, she agreed to do so after JANETTE whispered to her that she would call someone. *See SMF* ¶ 13. JANETTE subsequently called the Windham Police Department and informed them about the altercation between ANITA and JANELLE. *See SMF* ¶ 14. DENBOW responded to the call, and, upon arriving at the home of JANETTE, was informed that ANITA had assaulted JANELLE, had threatened further harm to her children and that she would flee the state with the children if the police were called. *See SMF* ¶ 14.

JANETTE also called SCOTT at work and told him that ANITA had assaulted JANELLE. *See SMF* ¶ 15. SCOTT called the Cumberland County Sheriff's Department, and then went to the Dry Mills Store near where ANITA lived. *See SMF* ¶ 15. ANITA noticed Scott's vehicle, and later walked over to the store. *See SMF* ¶ 15. Two police officers arrived at the store, and conversed with ANITA about what had happened. *See SMF* ¶ 15.

DENBOW contacted the Cumberland County Sheriff's Department to request assistance in locating ANITA. *See SMF* ¶ 16. He was informed that deputy sheriffs had already responded to a call from SCOTT and were with ANITA and her children. *See SMF* ¶ 16. DENBOW then spoke to SCHNUPP, who was with ANITA. *See SMF* ¶ 17. DENBOW explained to SCHNUPP what had been described by JANETTE, and requested that ANITA be placed under arrest

and transported to the Windham Police Department. *See SMF* ¶ 17. DENBOW made this request because he "reasonably felt the assault would continue if the people or the children were still with her." *See SMF* ¶ 17. SCHNUPP arrested ANITA without warrant and transported her to the Windham Police Department where she was turned over to their custody. *See SMF* ¶ 18.

SCOTT brought a protection from abuse action on behalf of JANELLE against ANITA, and a hearing was held on October 3, 1997 in the Maine District Court. *See SMF* ¶ 19. ANITA contends that SCOTT gave false testimony at this hearing concerning details about events from their marriage. *See SMF* ¶ 20. SCOTT denies ANITA's allegations that he or JANETTE lied at the hearing. *See SMF* ¶ 20. Subsequently, the Maine District Court gave SCOTT primary physical residence of JANELLE and JOSEPH. On May 6, 1998, ANITA was found not guilty of assaulting JANELLE.

REASONS FOR DENYING THE WRIT

It has long been the policy of this Court not to grant certiorari merely to correct alleged errors made by other courts. *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *see also Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) ("Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals."). This policy is now codified at Rule 10 of the Rules of the Supreme Court, which indicate the following "character of reasons" to be considered in granting or denying petitions for certiorari to a court of appeals:

- If there is a conflict on an important question of federal law between two courts of appeals, a court of appeals and a state court of last resort, or two state courts of last resort.

- If a court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

- If a court of appeals has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory powers.

As more fully set forth below, none of these criteria are met in this case. There is no conflict between the First Circuit's decision below and any other court decision, and Petitioner's argument that "divorced women parents" are a recognized class pursuant to 42 U.S.C. § 1985(3) does not present a compelling issue of federal law. What Petitioner really seeks is correction of allegedly erroneous factual findings or misapplication of properly stated rules of law, which is exactly what Rule 10 forbids. Accordingly, this Court should deny the Petition for a Writ of Certiorari.

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT WITH RESPECT TO THE CLAIMS AGAINST RESPONDENT SCOTT LOSCIUTO.

A. There is no conflict with respect to the decision below on ANITA's § 1983 claim.

With respect to the 42 U.S.C. § 1983 claim, ANITA argues that SCOTT "acquired state actor status" by conspiring with DENBOW to have ANITA arrested. ANITA contends that the decision below granting summary judgment to SCOTT on the § 1983 claim is in conflict with a number of Supreme Court cases. *See Petition* at 17 (*citing, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970)). A cursory examination of these precedents belies ANITA's claim.

The cases cited by ANITA stand for the proposition that a private party who conspires with a government official acts "under color of state law" for the purposes of § 1983. This rule of law is not in dispute. On this point, the District Court cited *Gonzalez-Morales v. Hernandez-Arencibia*, 221 F.3d 45 (1st Cir. 2000), which references *Lugar* and *Casa Marie, Inc. v. Superior Court of Puerto Rico*, 988 F.2d 252 (1st Cir. 1993) in delineating the requirements for determining whether a private person has state actor status under § 1983. *Casa Marie* considered and rejected a plaintiff's argument that a defendant had conspired with a state judge, because the plaintiff had failed to produce evidence to support the conspiracy allegation. *See Casa Marie, Inc.*, 221 F.3d at 259 (*citing Adickes*, 398 U.S. 144).

Similarly, in this case, the District Court granted summary judgment to SCOTT on the § 1983 claim because

ANITA had failed to produce any evidence that SCOTT conspired with DENBOW in procuring her arrest. This decision of the District Court, adopted by the First Circuit, is not "in conflict" with any of the decisions cited by ANITA or any other decision. Despite ANITA's feeble protestations to the contrary, th crux of her Petition is her disagreement with the District Court's finding that there was no genuine issue of material fact regarding her meritless conspiracy allegation. Rule 10 makes it clear, however, that certiorari is not granted when "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." ANITA's argument that the decision below conflicts with this Court's decisions should be summarily rejected.

B. There is no conflict with respect to the decision below on ANITA's § 1985(3) conspiracy claim.

ANITA does not argue that the First Circuit's decision below on her claim pursuant to 42 U.S.C. § 1985(3) conflicts with any other court decision. Indeed, ANITA concedes that there is a "dearth of precedent" to support her argument that "divorced women parents" are a recognized class under § 1985(3). *Petition* at 18. In fact, courts considering similar arguments are unanimous in holding that only those classes of persons that have suffered "historically pervasive discrimination" based on "immutable characteristics" are entitled to protection under § 1985(3). *See Bray v. Alexandria Women's Health Ctr.*, 506 U.S. 263 (1993) (holding that women seeking abortions are not a protected class); *Estate of Cooper v. Leamer*, 705 F. Supp. 1081 (M.D. Pa.1989) (holding that large families in small towns are not a protected class); *Humphrey v. Court of Common Pleas of York County, Pennsylvania*, 640 F. Supp. 1239 (M.D. Pa. 1986) (holding that divorced fathers are not a protected class).

II. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW WITH RESPECT TO THE CLAIMS AGAINST RESPONDENT SCOTT LOSCIUTO.

A. The decision below does not decide an important question of law with respect to the § 1983 claim.

As argued above in section I(A), there is no dispute over the proper standard of law to be applied on the § 1983 claim, i.e., a private party who conspires with a government official acts "under color of state law" for the purposes of § 1983. The gist of ANITA's Petition is really that the court below misapplied this standard. This is not a sufficient basis to grant certiorari to the Supreme Court of the United States. *See* Sup. Ct. R. 10; *Watt*, 451 U.S. at 275 n.5 ("[O]ur certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases."). This Court can only grant a fraction of the thousands of petitions for certiorari it receives every term, and it would be a misuse of its finite resources to grant certiorari merely to review the alleged misapplication of a proper legal standard. *See Watt*, 451 U.S. at 273-74 ("[T]he Court may misuse its scarce resources . . . by granting certiorari without adequate justification."); *Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, J., dissenting) ("A high degree of selectivity is thereby enjoined upon us in exercising our certiorari jurisdiction.").

B. The decision below does not decide an important question of law with respect to the § 1985(3) claim.

ANITA's contention that "divorced or otherwise single women parents" are a protected class under § 1985(3) is similar to the meritless contention advanced in *Estate of Cooper*, 705 F. Supp. at 1088 ("[the] argument that a large family in a small town constitutes a class . . . is frivolous"). ANITA's only assertion for granting certiorari on this issue is that a Supreme Court decision "would affect millions of divorced parents." *Petition* at 17. This argument serves as a reminder that the "class-based animus" requirement fashioned by this Court is designed to prevent § 1985(3) from becoming a font of "general federal tort law." *Bray*, 506 U.S. at 269. The plain fact of the matter is a person's marital status is not an immutable characteristic and is not deserving of protection under § 1985(3). *See, e.g., Bray*, 506 U.S. at 269-70 (holding that women seeking abortion are not protected class).

III. THE DECISION BELOW DOES NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

ANITA argues that the decision below is "so erroneous in both substance and procedure that the supervisory power of the Supreme Court should be invoked to correct the matter." *Petition* at 11, 18-21. The lower court's decision on the "substance" or merits of the Respondents' summary judgment motions is not properly considered in determining whether there has been a departure from the "accepted and

usual course of judicial proceedings." In any event, ANITA's argument that the District Court refused to follow other decisions by District Court judges ignores the obvious fact that only this Court or the First Circuit has the authority to make binding precedent in the District of Maine on issues of federal law. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 58 n.11 (1997) (noting Ninth Circuit's observation that a district court's decision does not even bind the same judge in a subsequent case).

The procedural flaws alleged by ANITA are that the District Court failed to make sufficient findings of fact in ruling on the summary judgment motions, and that the First Circuit used the same judges that comprised the original panel to rule on her application for rehearing *en banc*. *See Petition* at 19-21. Both of these arguments are clearly lacking in merit.

The Federal Rules of Civil Procedure specifically provide that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule . . . 56." Fed. R. Civ. P. 52(a). Findings of fact are not required on summary judgment motions because a court does not "find facts" under Rule 56, but merely determines if there is a "genuine issue as to any material fact" and whether a party is entitled to a judgment as a matter of law based on the undisputed facts. Fed. R. Civ. P. 56(c). Nevertheless, the District Court issued a thoughtful, lengthy, written decision that set forth its reasoning for granting summary judgment to the Respondents. ANITA's argument that the District Court erred in failing to make findings of fact is specious.

Perhaps even more spurious is ANITA's contention that the First Circuit erred in the selection of judges to consider her request for a rehearing *en banc*. The Federal Rules of Appellate Procedure promulgated by this Court make it clear

that a petition for rehearing *en banc* may be granted only by a "majority of the circuit judges who are in regular active service." Fed. R. App. P. 35(a). The rules do not forbid a judge who served on the original panel from considering a petition for rehearing. Far from departing from the "usual and accepted course of judicial proceedings," the First Circuit complied with the Federal Rules of Appellate Procedure to the letter. ANITA's desperate argument to the contrary is wholly without merit.

CONCLUSION

For all of the foregoing reasons, Respondent Scott Losciuto respectfully requests that this Honorable Court deny this Petition.

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TOWN OF WINDHAM, R. MICHAEL DENBOW, SCOTT LOSCIUTO and JANETTE LOSCIUTO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

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REPLY BRIEF

Petitioner respectfully submits this Reply Brief pursuant to Supreme Court Rule 15(6). Although recognizing that discussion of disputed facts is not favored in a Certiorari proceeding, Petitioner feels compelled under Supreme Court Rule 15(2) to briefly challenge the factual allegations of the Respondents.

The Brief In Opposition of each Respondent is addressed separately.

I. MICHAEL R. DENBOW

On page 2, DENBOW recites facts JANETTE allegedly reported to him; however, JANETTE denies having given DENBOW the information he recites as the basis for the probable cause determination. If one is to believe JANETTE, then DENBOW clearly had no basis for probable cause to arrest ANITA.

Equally important is that DENBOW was duty-bound to consider the statutory exclusion of parental discipline from the crime of assault as set forth in *17-A.M.R.S.A. Section 106 and 19-A.M.R.S.A. 4002(1)(A)*; thus any reasonably cautious officer would have sought clarification and obtained other evidence through interviewing the alleged perpetrator, the alleged victim and an eleven year old eye-witness, all of whom were together and readily available to him for interview.

In truth, DENBOW never had probable cause at any point; and had he interviewed ANITA, JANELLE and JOSEPH, he would have realized that the incident was simply a disciplinary family matter involving a parent

and a rebellious child – an event that happens every day all over America.

II. JANETTE LOSCIUTO

At note 2 on page 2, JANETTE has grossly misrepresented the facts relating to the sufficiency of the complaint. There has never been a conference of any kind between the District Court Judge and counsel, although the phrasing used by JANETTE implies that there was a conference of some sort with the District Judge wherein he expressed "frustration" with the complaint. This flatly is not true! The nearest we ever came to the scenario described by JANETTE's counsel was during a telephone pre-trial conference wherein the Magistrate explained that he did not have the complaint in front of him at his home where he was recuperating from very recent spinal surgery and could not clearly follow the causes of action being enumerated by Plaintiff's counsel. Counsel for both JANETTE and SCOTT then began to gripe about the clarity of the complaint because they had negligently failed earlier to answer all the causes of action asserted against them. No 12(b)(6) motions have ever been filed.

On page 5, JANETTE refers to the testimony of two witnesses present at the clogging event and the return trip to Maine. What she doesn't disclose is that the 17 year old female (Kirsten Gustofsen) was the ring leader in the use of vulgar language relating to sex, oral sex, orgasms and the bringing of hard liquor and older boys to the girls' rooms contrary to the rules and ANITA's

protestations. The other witness (Alice Bryant) encouraged the older girls and attempted to butt-in to the admonitions ANITA was giving JANELLE. ANITA denies the use of vulgar language and threats toward JANELLE. A fair-minded reading of the referenced transcript will demonstrate the bias and prejudice of both witnesses, both of whom were fully discredited under cross-examination.

On page 10, JANETTE (following the District Court's lead) points out that Petitioner has not demonstrated "any class-based discriminatory animus" in support of her 1985(3) claim. Perhaps both have simply misunderstood Petitioner's position on that issue. Petitioner has consistently claimed that the motivation of JANETTE and SCOTT was to obtain custody of the children, disrupt the maternal household and avoid paying $107.00 per week in child support and then collect approximately $60.00 weekly from ANITA, all in addition to a revenge motive for having SCOTT arrested for assaulting ANITA during their marriage and for taking him back to court to collect arrears in child support. The class of persons of which Petitioner is a member is the female counter-parts of failed marriages, or otherwise single women parents.

The foregoing is set forth in the SMF and Affidavit of ANITA, paragraphs 6 and 7, the Affidavit of Michael Borlawsky, paragraph 4 (Cert. Pet. Appendix 43-44 and 47-50). Moreover, SCOTT acknowledged in his deposition that he lived under such poor housing conditions because he couldn't get a mortgage because of his monthly obligations, including about $500 in child support. After obtaining full custody and receiving the child support money

from ANITA, he obtained a mortgage and built a nice house (comparative photos in record).

III. SCOTT LOSCIUTO

Again, Petitioner does not wish to engage in factual disputes; but to the extent that SCOTT's allegations are pertinent and appropriate, ANITA either denies or contends that the facts he describes are either untrue or greatly distorted.

Finally, it is of great interest to note that all the Respondents failed to refute the allegations set forth on pages 5 and 6 of the Petition relating to the specific information DENBOW claims to have received from JANETTE, but denied by JANETTE, all of which creates serious questions of material facts as well as credibility.

CONCLUSION

The Supreme Court is respectfully urged to grant certiorari to the U.S. Court of Appeals for the First Circuit.

Respectfully submitted,

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No. 01-1033

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TOWN OF WINDHAM, R. MICHAEL DENBOW, SCOTT LOSCIUTO and JANETTE LOSCIUTO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment to the Constitution requires a police officer to test all defenses to a crime before effecting an arrest if the officer has sufficient information to conclude that a crime has been committed or is being committed?

2. Whether the Petitioner has articulated sufficient grounds for review of the lower courts' decisions relative to alleged use of force?

3. Whether Federal Rule of Civil Procedure 52(a) requires findings of fact in resolving a motion for summary judgment?

4. Whether the United States District Court for the District of Maine or the United States Court of Appeals for the First Circuit departed from the accepted and usual course of judicial proceedings?

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WINDHAM RESPONDENTS' BRIEF IN OPPOSITION

Respondents Officer R. Michael Denbow and the Town of Windham ("the Windham Respondents") respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the Judgment of the United States Court of Appeals for the First Circuit ("the First Circuit") issued on July 6, 2001 affirming the Order of the United States District Court for the District of Maine ("the District Court") dated September 26, 2000, which are reproduced in the Appendix to the Petition at pages 34 and 23, respectively. The Petitioner has failed to generate an issue worthy of review by this Court and the Court should reject the Petitioner's request.

The federal law claims in this case did not turn on any controversial legal points. The District Court noted that the Petitioner did not contend that the witness statements Officer Denbow had received, if believable, failed to provide probable cause for her arrest. The District Court concluded that Officer Denbow, having determined that probable cause existed, was not legally required to test the Petitioner's defenses before effecting her arrest. Finally, the District Court held that the Petitioner failed to generate an issue of fact on her claim for use of excessive force. In reaching that conclusion, the District Court noted that the Petitioner "barely pressed" her claim.

The First Circuit, through a panel of three judges, affirmed the District Court's Order based on the reasoning set forth by the District Court Judge. The Circuit Court panel did not deem it necessary to issue a separate opinion, nor did the Court as a whole find any basis for reviewing the panel's decision. While the Petitioner may

disagree with these rulings, she has not demonstrated a legitimate reason for the Supreme Court to invoke certiorari review.

STATEMENT OF THE CASE

The dispute in this lawsuit arises out of the Petitioner's warrantless arrest on July 30, 1997. In her response to the Windham Respondents' Statement of Material Facts in Support of Motion for Summary Judgment, the Petitioner admitted or failed to dispute Officer Denbow's knowledge of the following facts:[1]

At approximately 10:45 on the morning of July 30, 1997, Officer Denbow received a call from his dispatcher about an assault complaint. (Denbow Dep. at 14) (hereafter "D. at ___"). Officer Denbow proceeded to 287 Falmouth Road in Windham to investigate. (D. at 14-15).

Upon arriving, he spoke with the complainant, Defendant Jeanette Losciuto. (D. at 15). She informed him that she had witnessed the Petitioner "on top of Janelle (the Petitioner's daughter and Ms. Losciuto's granddaughter) hitting her in the head with her fists and hands and choking her." (D. at 17). She also provided Officer Denbow with background as to some irrational behavior

[1] The Petitioner's effort to generate an issue of fact in her Petition with regard to the information in Officer Denbow's possession at the time he ordered the Petitioner's arrest is unavailing. Facts deemed to be admitted as part of the summary judgment process control the record for the purposes of appeal. *See Betances v. Sea-Land Servs., Inc.*, 248 F.3d 40, 43-44 (1st Cir. 2001).

by the Petitioner that had occurred earlier that week during a trip to Virginia. (D. at 15-16). She stated that the Petitioner prevented Joseph (the Petitioner's son and Ms. Losciuto's grandson) from calling the police and that the Petitioner ordered her children to leave Ms. Losciuto's home or "they would get something worse when they got home." (D. at 17). As the children left Ms. Losciuto's house, the Petitioner told Ms. Losciuto not to call the children's father (Defendant Scott Losciuto) or the police or "she would leave the state with the two kids." (D. at 17).

Officer Denbow interviewed Ms. Losciuto for a considerable length of time. (D. at 17). She appeared to him to be a reliable witness. (D. at 17). She indicated that the Petitioner entrusted her to care for the children and that she did so approximately 90 percent of the time. (D. at 29).

Upon further inquiry, Ms. Losciuto explained that the Petitioner had acted irrationally in the past, including a situation where she threatened to leave the state "and send the kids back in pieces." (D. at 18). She also stated that the Petitioner had been treated for suicidal threats about ten years ago. (D. at 18).

Based on the information provided by Ms. Losciuto, Officer Denbow determined that the Petitioner should be arrested for assault. (D. at 18-19). He also concluded that there was a definite threat that further assaults would occur and that the Petitioner might leave the state with the children. (D. at 18). He advised his dispatcher to issue a lookout for the Petitioner's vehicle. (D. at 19).

Officer Denbow learned from dispatch that the Petitioner was currently speaking with Cumberland County Sheriff's deputies, including Defendant Deputy Joachim Schnupp. (D. at 20). Officer Denbow spoke to Deputy Schnupp by telephone and conveyed the information he had obtained from Ms. Losciuto. (D. at 26-27). He asked Deputy Schnupp to arrest the Petitioner on the charge of assault and transport her to the Windham Police Station. (D. at 27).

Officer Denbow met the Petitioner and Deputy Schnupp at the Station. (D. at 30-31). He observed that her hands were cuffed in front of her body. (D. at 30-31). She was escorted to the booking area, checked for weapons, and placed on a bench. (D. at 30-31).

From the time the Petitioner arrived at the Windham Police Department until the time she was released at Maine Medical Center, with two notable exceptions, the facts are largely undisputed:

Officer Denbow began processing the charge for booking, a task that was taken over by another officer when Scott Losciuto and the children arrived at the Station. (D. at 31-32). Officer Denbow spent approximately half an hour taking statements from the children before returning to the booking area. (D. at 35, 39).

The Petitioner was still on the bench when Officer Denbow returned. (D. at 39). Officer Denbow observed the Petitioner fall off the bench and on to the floor. (D. at 39). The Petitioner did not give any sign that she was about to pass out. (D. at 39). He called to the Petitioner but she did not respond. (D. at 40). Officer Denbow, who is trained as an emergency medical technician, took the

Petitioner's pulse and made observations about her skin and respiration. (D. at 40). Everything appeared normal. (D. at 40).

Officer Denbow called dispatch and requested a paramedic from the neighboring building. (D. at 41). At no time did Officer Denbow kick the Petitioner or otherwise touch her with his foot. (D. at 42).[2]

Doug Remington, the chief of Windham Rescue, responded to the call and examined the Petitioner. (Remington Aff. ¶2) (hereafter "R.A. ¶___"). Sheappeared to awake for Mr. Remington and informed him that she fainted due to low blood sugar. (R.A. ¶3). Mr. Remington tested her blood sugar level and it was within

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[2] This episode, along with the alleged viewing of the Petitioner in the bathroom at the hospital, represents the only notable factual difference the Petitioner identified as part of the summary judgment briefing. The Petitioner alleges that Officer Denbow kicked her in the leg when she "fainted" at the Station. (B. at 51-52). She states that she told Officer Denbow that she thought she was going to be sick and he responded by telling her the location of the bathroom. (B. at 49). She claims that after she vomited she continued to complain of dizziness and disorientation and suggested that she might be having a hypoglycemic reaction. (B. at 50). She states that she told the officers that she felt like she was going to pass out. (B. at 50). She claims that she did then pass out and that she was kicked by Officer Denbow as she lay on the floor. (B. at 51-52). She explains that her knowledge of being kicked is not impaired by her lack of consciousness because she was "coming in and out." (B. at 52). As the District Court properly concluded, any inconsistencies in these two versions of the facts were not material to resolution of the Petitioner's claims on summary judgment.

normal limits. (R.A. ¶4). He also tested her blood pressure and found it to be within normal limits with no suggestion of dehydration. (R.A. ¶5). The Petitioner made no complaint to Mr. Remington that her leg was injured or that she had been kicked. (R.A. ¶6). He indicated in his examination report that his diagnosis was: "behavioral." (R.A. ¶7). By that, he meant that the Petitioner's complaints were not substantiated by his examination. (R.A. ¶8).

Officer Denbow contacted the Petitioner's doctor, Dr. Schuler, to report her behavior. (D. at 44). Dr. Schuler indicated that he had already been contacted by the Petitioner's family about her erratic behavior. (Schuler Dep. at 53) (hereafter "S. at ___"); (D. at 46). Dr. Schuler recommended that the Petitioner be hospitalized. (S. at 56-61; D. at 46). He stated that he would call Maine Medical Center to arrange for an emergency psychiatric admission. (S. at 56-61; D. at 46). He asked Officer Denbow to transport the Petitioner to MMC for this admission. (S. at 60-61; D. at 46).[3]

Officer Denbow cuffed the Petitioner's hands in front of her body and drove her to MMC. (D. at 49, 50). He spoke with a triage nurse and informed her why he was there with the Petitioner. (D. at 52). The MMC staff acknowledged that Dr. Schuler had called concerning the

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[3] The Petitioner disclaimed any knowledge as to why Officer Denbow took her to MMC. (B. at 57).

Petitioner's admission. (D. at 52). He removed the Petitioner's handcuffs and left her with the admitting staff. (D. at 54, 57-58).[4]

The only treatment the Petitioner received with regard to an injury to her leg was a heating pad provided by MMC. (B. at 65). After the alleged incident she was evaluated twice – once by Mr. Remington and once by the staff at MMC. (B. at 52-53); (Pl. Int. Resp. ¶14 & Exh. A). She did not make any complaints of a leg injury to Mr. Remington. (R.A. ¶6). Subsequently, an MMC nurse examined the Petitioner's leg specifically to determine if she had sustained an injury as a result of the alleged kick and found none. (Pl. Int. Resp. ¶14 & Exh. A). Other than the alleged deep tissue leg bruise, the Petitioner does not claim that she was physically injured by Officer Denbow. (B. at 63).

Officer Denbow has been a police officer for 22½ years. (D. at 4). He is a graduate of the New Hampshire Criminal Justice Academy and is academy certified by the State of Maine. (D. at 11). During his employment for the Town of Windham he has continued to take numerous classes on the law, search and seizure, police involvement in crimes, crime scene investigations, field training officer and firearms instructor. (D. at 11). He also received training on how to effect arrests. (D. at 12).

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[4] *See supra* note 2. The Petitioner also suggests that she went to the bathroom at MMC and that Officer Denbow stood in the doorway of the bathroom while she was in there. (B. at 57-58). While Officer Denbow denies that this occurred, the District Court properly concluded that this dispute was not material for the purposes of summary judgment. (D. at 56).

There is no evidence in this case to suggest that the conduct alleged by the Petitioner occurred pursuant to a custom, policy or practice of the Town of Windham. (Pl's Int. Resp. ¶29). In her interrogatory answers, the Petitioner fails to identify any such information. (Pl's Int. Resp. ¶29).

REASONS FOR DENIAL OF THE WRIT

The Petitioner has not articulated a viable basis for review by this Court. She has not demonstrated any conflict between the holdings of this Court and the decision of the District Court, which was adopted by the First Circuit. Further, the District Court's application of Fourth Amendment precedent (as affirmed by the First Circuit) is entirely consistent with the approach taken by other Circuit Courts of Appeals. This Court should decline to issue a Writ.

I. THE FEDERAL COURTS HAVE CONSISTENTLY REJECTED THE NOTION THAT THE FOURTH AMENDMENT REQUIRES A LAW ENFORCEMENT OFFICER TO TEST THE VIABILITY OF A SUSPECT'S DEFENSES WHEN THE OFFICER HAS A REASONABLE BELIEF THAT A CRIME HAS OCCURRED OR IS OCCURRING.

Since at least 1970, when this Court decided *Chambers v. Maroney*, 399 U.S. 42 (1970), federal courts have consistently upheld probable cause determinations based on eyewitness reports. In *Chambers*, police officers stopped a vehicle and arrested its occupants based on a report by

eyewitnesses to a robbery. The Court did not pause in concluding that the officers had probable cause to effect the stop and arrest:

> We pass quickly the claim that the search of the automobile was the fruit of an unlawful arrest. Both the courts below thought the arresting officers had probable cause to make the arrest. We agree. Having talked to the teen-age observers and to the victim Kovacich, the police had ample cause to stop a light blue compact station wagon carrying four men and to arrest the occupants, one of whom was wearing a green sweater and one of whom had a trench coat with him in the car.

Id. at 46-47. The First Circuit has followed this construction of the Fourth Amendment's probable cause requirement. *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341, 351 (1st Cir. 1995). Other Circuit Courts are in accord. *See, e.g., Grimm v. Churchill*, 932 F.2d 674, 675 (7th Cir. 1991); *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996); *J.B. v. Washington County*, 127 F.3d 919, 930 (10th Cir. 1997).

This application of the Fourth Amendment is hardly controversial. In reviewing an officer's probable cause determination, a court undertakes " 'an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time' and not [an assessment of] the officer's state of mind at the time the challenged action was taken." *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (quoting *Scott v. United States*, 436 U.S. 128, 136 (1978)). Probable cause will be found if "the facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information

were sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense." *Rivera v. Murphy*, 979 F.2d 259, 263 (1st Cir. 1992) (quoting indirectly *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). As this Court has emphasized, probable cause exists as a matter of probabilities and not certainties. *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983). Credible and material statements by an eyewitness are clearly sufficient to warrant a prudent officer to believe that an offense has probably occurred or is probably occurring.

While this Court has embraced the "totality-of-the-circumstances" approach to probable cause determinations, it has never wavered from the "practical, nontechnical conception" of probable cause. *Id.* at 230-31. *Gates* clarifies that probable cause is a "fluid concept" that relies in part on the experience and knowledge of the officer. *Id.* at 232 (citing *Adams v. Williams*, 407 U.S. 143, 147 (1972)). For example, the *Gates* Court suggested that an officer is entitled to weigh and consider witness information as the sole basis for probable cause: "if an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary." *Id.* at 233-34 (citing *Adams v. Williams*, 407 U.S. 143, 147 (1972)).

The Petitioner did not directly challenge below the sufficiency of the evidence Officer Denbow in fact possessed at the time he ordered her arrest. Apart from noting Ms. Losciuto's identity as a former mother-in-law, the Petitioner did not intimate any basis for questioning Ms. Losciuto's reliability. The Petitioner's concessions

with regard to the sufficiency of Officer Denbow's facts were noted by the District Court.

The Petitioner's stated objection – that Officer Denbow was required to test the Petitioner's defense or claim of innocence notwithstanding sufficient evidence to establish probable cause – is not supported by this Court's decisions or by decisions from the Circuit Courts of Appeals. *Chambers* does not intimate that such additional investigation is required and *Gates* supports Officer Denbow's reliance on a reliable eyewitness. Further, this Court expressly rejected an effort to impose such a requirement on officers executing an arrest warrant:

> Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim. The ultimate determination of such claims of innocence is placed in the hands of the judge and the jury.

Baker v. McCollan, 443 U.S. 137, 145-46 (1979).

The First Circuit has held that the Fourth Amendment does not require police officers to investigate every possibility of innocence before effecting a warrantless arrest. *United States v. Bonilla Romero*, 836 F.2d 39, 46 (1st Cir. 1988). Rather, the First Circuit has emphasized that an arrest complies with the Fourth Amendment if "facts

and circumstances within [the arresting officer's] knowledge and of which [the officer] had reasonably trustworthy information . . . [is] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." (internal quotation marks omitted) (quoting *Draper v. United States*, 358 U.S. 307, 313 (1959); citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

Other Circuit Courts have taken an approach to the Fourth Amendment that is consistent with that taken by the First Circuit. For example, in *Ricciuti v. New York City Transit Authority*, 124 F.3d 123, 128 (2nd Cir. 1997), the United States Court of Appeals for the Second Circuit concluded that "[o]nce a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." (citing *Baker v. McCollan*, 443 U.S. 137, 145-46 (1979)). Similarly, in *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1264 (8th Cir. 1996), the United States Court of Appeals for the Eighth Circuit upheld the arrest of a suspect based on the eyewitness account of a 9-year old girl and rejected the suspect's argument that the arresting officers should have investigated his alibi: "The officers were not required to conduct a mini-trial before arresting Brodnicki." (citing *Morrison v. United States*, 491 F.2d 344, 346 (8th Cir. 1974)). *Accord Torchinsky v. Siwinski*, 942 F.2d 257, 264 (4th Cir. 1991) (holding that an officer is not required to "exhaust every potential exculpatory lead or resolve every doubt about a suspect's guilt before probable cause is established"); *Klein v. Long*, 2001 U.S. App. LEXIS 26990, *15

(6th Cir.) (holding that "once a police officer has sufficient probable cause to arrest, he need not investigate further"); *Ahlers v. Schebil*, 188 F.3d 365, 371 (6th Cir. 1999) (holding that "[o]nce probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused"); *Grimm v. Churchill*, 932 F.2d 674, 675 (7th Cir. 1991) (upholding probable cause determination based on eyewitness report and noting that complete investigation is not constitutionally required if probable cause exists); *J.B. v. Washington County*, 127 F.3d 919, 930 (10th Cir. 1997) (holding that deputy's assessment of witness's veracity was sufficient to support probable cause without further corroboration); *Rankin v. Evans*, 133 F.3d 1425, 1435-36 (11th Cir. 1998) (stating that an officer need not take "every conceivable step . . . at whatever cost, to eliminate the possibility of convicting an innocent person").

Since Officer Denbow had probable cause to support the Petitioner's arrest, and since there is no constitutional requirement that he investigate defenses once he has acquired probable cause, the Petitioner lacks viable grounds for review by this Court.

II. THE PETITIONER HAS NOT IDENTIFIED A BASIS FOR THIS COURT TO REVIEW THE LOWER COURTS' HOLDING WITH REGARD TO USE OF FORCE.

The Petitioner barely pressed the issue of use of force before the District Court and the First Circuit. Therefore, she has not properly reserved the issue for the purposes

of review by this Court. *See United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082 (1990); *cf. Illinois v. Gates*, 462 U.S. 213, 217-18 (1983) (party must raise issue below to preserve it for appeal).

In any event, she has not presented a sufficient basis for review. The Petitioner did not develop an argument to suggest that the District Court or the First Circuit applied the wrong legal standard or a standard that conflicts with precedent from this Court or from other Circuit Courts. Rather, she appears to contend that the District Court and the First Circuit reached an incorrect result. In fact, the alleged conduct and the objective evidence do not support a claim based on use of excessive force. Of equal significance, this determination is more properly left to the First Circuit. There is no occasion for this Court to intercede. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.").

To the extent that the Petitioner meant to suggest that the District Court and the First Circuit failed to apply governing legal standards set forth in *Alexis v. McDonald's Restaurants of Massachusetts, Inc.*, 67 F.3d 341 (1st Cir. 1995) and *Graham v. Connor*, 490 U.S. 386 (1989), her argument is groundless. Neither *Alexis* nor *Graham* stands for the proposition that a police officer's actions can be cumulatively evaluated for the purposes of the Fourth Amendment. *See also Jenness v. Nickerson*, 637 A.2d 1152, 1158 (Me. 1994) (applying federal case law) ("Because each individual action does not violate the constitution, the totality of those actions does not violate Petitioners' rights."). If anything, the *Graham* Court urged the lower

courts to be rigorous in identifying the specific conduct at issue so that the appropriate constitutional standard could be applied. *See Graham,* 490 U.S. at 393-94 ("In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.") (citing *Baker v. McCollan,* 443 U.S. 137, 140 (1979)). Since the Petitioner has not demonstrated any reason to justify review, this Court should decline to consider the Petitioner's request.

III. FINDINGS OF FACT ARE NOT REQUIRED IN RULINGS ON MOTIONS FOR SUMMARY JUDGMENT.

Federal Rule of Civil Procedure 52(a) specifically states in relevant part that "[f]indings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56." Even if the Petitioner had properly preserved this issue, which she did not, the plain text of Rule 52 contradicts her entire argument.

IV. THERE WERE NO IRREGULARITIES IN THE PROCEDURES BELOW TO JUSTIFY REVIEW BY THIS COURT.

The Petitioner's omnibus argument concerning the treatment of this case below fails to generate an issue worthy of review by this Court. As discussed above, Federal Rule of Civil Procedure 52(a) does not require *any* findings of fact; therefore, the District Court's refusal to find certain facts cannot be erroneous.

The remaining examples of misconduct by the District Court relate to that body's alleged failure to follow governing precedent. As discussed above, to the extent the Petitioner preserved the issues by developing cogent arguments, the District Court applied the correct legal standards. The Petitioner's dissatisfaction with the result is no basis for review by this Court.

The Petitioner's complaints about the First Circuit's conduct do not merit a lengthy response. Suffice it to say the First Circuit had the authority to dispose of the case as it did, *see Lawton v. State Mut. Life Assurance Co.*, 101 F.3d 218, 220 (1st Cir. 1996), and the Petitioner did not present the Circuit Court judges sitting *en banc* with a viable reason to review the panel's determination.

CONCLUSION

For the reasons discussed above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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